Before the
Federal Communications Commission
Washington D.C. 20554

In the matter of	)	
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS AND THE NETWORK AFFILIATED STATIONS ALLIANCE

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SUMMARY

The National Association of Broadcasters ("NAB") and the Network Affiliated Stations Alliance ("NASA") urge the Commission to retain the 35 percent national television ownership cap based on persuasive evidence that the cap furthers core communications policies, particularly localism and competition. In addition, NASA advocates retention of the dual network rule because it fosters competition and the emergence of new major networks.

The National Television Ownership Rule. Two bedrock principles, flowing from the Communications Act itself, together comprise the national policy objective of localism and converge to support the current 35 percent ownership rule. The first is that broadcast spectrum is to be allocated, allotted, and licensed so as to ensure service oriented to numerous local communities. The second follows from and implements the first in holding that broadcast licenses are to be conferred on recipients that will carry out the purpose of this statutory policy by providing service responsive to the needs and interests of their communities. The networks make an important contribution to the service that the system of geographically-dispersed broadcast licenses intends. Not only do they make available the high-quality national programming that is an essential component of the public's broadcast service, but the same programming also serves as a foundation for complementary locally-produced and locally-selected programming that constitutes the other key ingredient of that service. The national TV ownership rule is needed to maintain this balance between national programming excellence and local-community responsiveness.

In important measure, the power of the networks is derived from the licenses for the most favored broadcast facilities in the most populous and lucrative markets in the country. The Commission has conferred these licenses on the networks, as it has licenses on independently-owned stations, to serve their local communities. The networks have leveraged

off these franchises to build powerful engines of program production and distribution and in turn have used this leverage to develop sweeping other business interests in cable and the Internet.

It was always the case that network licensees served two masters – the need to respond to the needs of their communities and the need to support their parents' national program and advertising distribution businesses. Independently-owned affiliates operated under only the former mandate. Because of the importance, but not the exclusive importance, of high-quality national programming, the dual priorities of network licensees were accepted as a plus, both by the government and by independently-owned affiliates. But the need for some check on the power of the networks has always been recognized – a check to assure that the system would continue to be true to the localism principles of broadcast allocation policy and licensee responsibility to the local community. Thus, from the beginning, the Commission has limited the concentration of national ownership of broadcast television stations.

The attached major new economic study by Professors Marius Schwartz and Daniel Vincent finds that the national TV ownership rule continues to serve the public interest because: (1) the programming decisions of independent affiliates are more closely attuned to the interests of local viewers than the programming decisions of network-owned-and-operated stations ("O&Os"), (2) the national TV ownership rule limits the ability of networks to control programming on local stations, and (3) broadcast television remains a significant force in the video marketplace. Professors Schwartz and Vincent conclude that a network has "powerful reasons to resist 'preemptions' by affiliates and enforce adherence to its nationally-uniform schedule." If networks *own* their stations, they can require network programming to be aired even if alternative programming is more suitable for the local audience. But "[c]hoices made by an independent affiliate typically will be more closely targeted to the interests of the viewers and local advertisers in its license area than would choices of a station owned or controlled by the network, given that the network has a geographically much broader orientation."

Empirical evidence supports the economists' findings. *First*, an NAB/NASA survey of network affiliates has gathered nearly 1,000 examples of preemptions by independent affiliates, demonstrating in detail that the affiliates' ability to preempt network programming allows them to better serve their local communities. The survey shows that most affiliates are experiencing pressure from their networks not to preempt network programming and that average affiliate preemptions have declined significantly. The limited empirical data available to NAB and NASA also support the conclusion that O&Os are far less likely than affiliates to preempt network programming.

Second, additional evidence shows that independent affiliates engage in a healthy give-and-take dialogue with their networks over network programming decisions and influence networks in ways that O&Os do not and can not.

Third, the balance of power between networks and their affiliates has further shifted in the direction of networks, as shown by recent changes in network affiliation agreements. (NAB takes no position on this controversy.)

Fourth, the television broadcast industry has undergone unprecedented consolidation, so that it is now dominated by the big four networks. With the relaxation of the national TV ownership rule, these four companies have acquired more television stations, particularly in the largest markets. With the repeal of the financial interest and syndication rules and because of other industry developments, the networks now supply most of their own prime-time content, dominate the syndication market, are increasingly "repurposing" broadcast fare on other video media, and have mounting incentives to favor their own programs. Independent affiliates serve to counterbalance this growing network power.

Fifth, affiliates outperform O&Os in terms of the quality of local news, as measured by a prestigious award, and there are no statistically significant differences between O&Os and independent affiliates in the quantity of local news programming or ratings.

In addition to serving the national policy objective of localism, the national TV ownership rule also furthers diversity as well as competition in national television advertising, program production, and the emergence of major new networks. As to advertising, the availability of national spot advertising as a constraint on network advertising depends on an adequate base of strong, independently-owned television stations. As to program production, independent affiliates provide a check on the networks' tendency to prefer their own programming. And as to the emergence of new networks, independent affiliates may decide to join forces with an emerging network. O&Os, unlike independent affiliates, cannot be expected to compete with themselves for advertising sales, challenge top management over network programming, or affiliate with a rival network.

The Commission's *1984 Multiple Ownership Report and Order* looked to abolish the ownership cap, but it was repudiated by Congress, and the Commission retreated from it. Moreover, it failed even to consider the ways in which the cap advances the seminal policy goal of localism, and in numerous other respects, was mistaken or no longer reflects current conditions.

The Dual Network Rule. The Commission recently determined that the major "mobility barrier" inhibiting the emergence of major networks is the availability of affiliated stations. The dual network rule remains in the public interest by preventing this mobility barrier from becoming an even greater obstacle to emerging networks. In addition, as a result of the repeal of the financial interest and syndication rules, the networks now produce most of their own programs. If the number of major networks were to decrease, the network "funnel" through which national television broadcast programming must pass would be narrowed. The rule also preserves competition by prohibiting the merger of any two of the four major networks, all of which compete with one another. Allowing the major networks to merge would also increase their economic leverage over affiliates to the detriment of localism.

The Commission recently modified the dual network rule to allow UPN to merge with CBS, thereby preserving a competitor. No similar reasons support allowing the merger of two of the major networks, which are already very large, vertically integrated, and financially successful.

The Legal Framework. The standard for retaining a rule under section 202(h) of the Telecommunications Act of 1996 is no more demanding than the standard for adopting a rule. The Commission has already taken this position before the court of appeals, and it is supported by: (1) the language and structure of section 202(h), (2) authoritative judicial interpretations of identical and highly similar language elsewhere in the Communications Act, (3) the legislative history of the 1996 Act, and (4) considerations of policy and common sense. Congress would not authorize the Commission to adopt a rule that is shown to be in the public interest, and then require that the rule be repealed two years later unless it can meet a higher standard (while leaving the Commission free immediately to re-adopt the rule under a lower standard).

Section 202(h) also directs the Commission to modify or repeal a rule only if it "determines" that the rule is "no longer in the public interest." The Commission may *not* modify or repeal a rule on the ground that it is not clear that the rule remains in the public interest. Instead, the Commission is required to make a determination: either the rule remains in the public interest or it does not. Both rules at issue here meet this test.

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COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS AND THE NETWORK AFFILIATED STATIONS ALLIANCE

The National Association of Broadcasters ("NAB") and the Network Affiliated Stations Alliance ("NASA") submit these comments in response to the Commission's Notice of Proposed Rulemaking released on September 23, 2002.[1] NAB is a non-profit, incorporated association of radio and television stations and broadcasting networks that serves and represents

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1 *In the Matter of 2002 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets*, FCC 02-249, MB Docket No. 02-277, MM Docket Nos. 01-235, 01-317, 00-244 (rel. Sept. 23, 2002) (herein "*NPRM*"). The deadline for filing comments was triggered by the release of 12 studies, filling some 800 pages, on October 1, 2002, and after a thirty day extension set for January 2, 2003.

the American broadcasting industry. NASA is a coalition representing the interests of more than 600 local television stations affiliated with the ABC, CBS, and NBC Television Networks.

I. THE NATIONAL TELEVISION OWNERSHIP RULE REMAINS IN THE PUBLIC INTEREST

A. Congress And The Commission Have Long Placed A Limit On Television Station Ownership To Promote Important Policy Goals, Including Localism, Diversity, and Competition

From the beginning, this country's television broadcast system has been centered on a single overarching objective: service to the public. The national network-local affiliate broadcast system serves viewers by combining the efficiencies of national television program production, distribution, and sales with decentralized control over the ultimate selection and broadcast of network and other programming.[2] This system has "served the country well."[3] Affiliates understand the benefits of strong networks and act in many ways to support and complement the networks, including by operating stations that effectively serve their local communities. At the same time, the judgments of individual affiliates – whose motivation to provide programs that best serve the tastes and needs of their local communities is not compromised by a competing interest in the national network that supplies the network programs

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[2] *See* H.R. Rep. No. 100-887, pt. 2, at 20 (1988) (the U.S. system combines the "efficiencies of national production, distribution and selling with a significant decentralization of control over the ultimate service to the public"); *In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962, 5037 (1990) ("considerable credit for [locally-originated programming's] existence must go to the framework in which it is broadcast . . . a framework formed by the national programming networks . . . [and local stations'] synergy of local and national offerings"); *In the Matter of Inquiry into the Scrambling of Satellite Television Signals and Access to those Signals by Owners of Home Satellite Dish Antennas*, 2 FCC Rcd 1669, 1691 (1987) (describing the network-affiliate relationship as "a true partnership serving the interest of both partners and the public interest by combining efficiencies").

[3] H.R. Rep. No. 100-887, pt. 2, at 20.

and advertisements and has various other business objectives – and the presence of a critical mass of affiliates capable of influencing network programming decisions creates a healthy dynamic that preserves the unique local orientation of our broadcast television service. As shown below, this dynamic strengthens localism even in markets where networks own and operate their own stations.[4]

If national networks were permitted to own stations serving a greater percentage of the American audience, the local affiliate's ability to select community-appropriate programming and to make important business and operational decisions would be lost. Increased network leverage would destroy the remaining affiliates' ability to place local community needs above the demands of the networks for uniform national clearance of all network programs. Moreover, the healthy dialogue between the affiliates body and the networks, which depends upon a financially-significant body of affiliates able to influence network decision-makers, would be eliminated. As a result, viewers would suffer because the choice of programming they watched would be dictated by what a few network executives in Hollywood and New York think will play well nationally, taking into account the networks' various business interests including program production, syndication foreign sales, and cable and Internet programming ventures, not by what local broadcasters think will work for the local communities they know well.

Congress and the Commission have long been concerned that the networks eventually could dominate the broadcast industry through excessive concentration of economic and program control, undermining the local licensee discretion central to the network-affiliate

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4 *See infra* pp. 23-24.

system and required by the Communications Act.[5] Consistent with these concerns, the Commission has adopted and overseen rules governing the network-affiliate relationship[6] and, for as long as it has regulated television broadcasting, has limited the concentration of ownership of broadcast television stations. Although the network TV ownership rule has been modified from time to time, its basic purpose has remained the same: to serve the public interest by advancing a variety of important Commission policies, including localism, diversity, and competition.

From the 1940s through 1996, the Commission placed a limit on the number of stations that a single owner could acquire. Between 1941 and 1984, the limit increased from three to five to seven stations.[7] In 1984, the Commission increased the ownership limit from

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5 The mandate that licensees must retain control of their broadcast licenses is central to the Communications Act of 1934 and, indeed, predates it. In enacting the Radio Act of 1927, Congress reacted to "widespread fear" that monopolies would dominate the broadcast field in the absence of appropriate government regulation. *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 137 (1940). Out of that concern, Congress adopted section 303(i) of the Act authorizing the Commission to "make special regulations" applicable to stations engaged in "chain broadcasting." *Report on Chain Broadcasting*, Commission Order No. 37, Docket No. 5060, at 85 (May 2, 1941) (herein "*Chain Broadcasting Report*") *modified, Supplemental Report on Chain Broadcasting* (1941), *appeal dismissed sub nom.*, *NBC v. United States*, 47 F. Supp. 940 (1942), *aff'd*, 319 U.S. 190 (1943).

6 The network rules that the Commission adopted to achieve that policy objective are contained in section 73.658 of the Commission's rules. The key rules are: (1) the "right-to-reject" rule, which protects the right of an affiliate to reject network programming it finds unsatisfactory, unsuitable or contrary to the public interest or to substitute programming the local station believes to be of greater importance, 47 C.F.R. § 73.658(e); (2) the network "option time" rule, which prohibits agreements that grant a network an option to use affiliate airtime to broadcast unspecified programs at some future date, *id.* § 73.658(d); and (3) the "exclusive affiliation" rule, which prohibits affiliation agreements or arrangements that prevent, hinder, or penalize network affiliated stations from broadcasting the programming of another network, *id.* § 73.658(a).

7 *See 1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications* (continued…)

seven to twelve stations and provided for the limit to sunset after six years unless the Commission determined that a continued limitation was warranted. Congress's reaction was swift. It imposed a moratorium on the Commission's authority to use appropriate funds to implement its decision.[8] The Commission quickly reconsidered and eliminated the automatic sunset provision.[9] In addition to retaining the twelve-station limit, the Commission imposed a 25 percent national ownership limit.[10]

There matters rested until Congress addressed the national TV ownership cap in the Telecommunications Act of 1996.[11] In the 1996 Act, Congress directed that "[t]he Commission shall modify its rules for multiple ownership set forth in section 73.3555 of its regulations . . . by increasing the national audience reach limitation for television stations to 35 percent."[12] The choice of a 35 percent cap was no casual decision on Congress's part. Rather, it

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(footnote cont'd)

Act of 1996, Biennial Review Report, 15 FCC Rcd 11058, 11066-67 (2000) (herein "*1998 Biennial Report*").

8 Second Supplemental Appropriations Act, Pub. L. No. 98-396, § 304, 98 Stat. 1369, 1423 (1984).

9 *See In the Matter of Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations*, 100 FCC 2d 74, 90, 96-97 (1984).

10 *Id.* at 89.

11 *See* Pub. L. No. 104-104 § 202(c)(1)(B), 110 Stat. 56 (1996).

12 *Id.* The ownership cap prevents any party, including those under common control, from "owning, operating or controlling, or having a cognizable interest in TV stations which have an aggregate national audience reach exceeding thirty-five (35) percent." 47 C.F.R. § 753.3555(e)(1). For purposes of making this calculation, the Commission defines "national audience reach" as "the total number of television households in the Nielsen Designated Market Area (DMA) markets in which the relevant stations are located divided by the total national television households as measured by DMA data at the time of a grant, transfer, or assignment of (continued…)

was the product of lengthy deliberations. The Senate, by a narrow 52-48 vote, rejected an amendment that would have maintained the cap at its previous level of 25 percent.[13] Both the Senate and the House explicitly rejected a proposed increase in the cap to 50 percent – a proposal supported by the networks – as contrary to the public interest.[14] Legislators voted against raising the cap to 50 percent based on "fear that this increase [to 50 percent] would be detrimental to our local stations and the idea of local control."[15] As Senator Helms stated, if networks were permitted to own affiliated stations covering 50 percent of the national audience, "[t]he networks will kick the dickens out of an affiliate if the affiliates do not toe the line."[16] Senator Hollings expressed the view that a 50 percent cap "would be embarrassing for anybody to stand on the floor and ask for."[17]

Having fixed the national broadcast reach cap at exactly 35 percent, members of Congress thought, unsurprisingly, that they had put the issue to rest for some time. As Representative Markey, one of the key proponents of the Act, stated: "This policy decision reflects a carefully calibrated balance and I believe *the duly considered view* of *Congress on*

(footnote cont'd)

a license" and requires UHF television stations "be attributed with 50 percent of the television households in their DMA market." 47 C.F.R. § 73.3555(e)(2)(i).

13 *See* 141 Cong. Rec. 11,15671 (1995).

14 *See* 141 Cong. Rec. 11,15333 (1995) (debate in Senate on 50 percent cap); 141 Cong. Rec. 16,22060 (1995) (House rejects 50 percent in favor of 35 percent by vote of 228 to 195).

15 141 Cong. Rec. 16,22059 (1995) (statement of Rep. Hall).

16 141 Cong. Rec. 11,15667 (1995) (statement of Sen. Helms).

17 142 Cong. Rec. 2,2232 (1996) (statement of Sen. Hollings).

these matters should settle the issue for many years to come."[18] Recently, a bipartisan group of Senators and Representatives wrote to Chairman Powell to oppose any increase in the cap and to urge that "the 35 percent cap shall remain where Congress established it in the law."[19]

As part of its 1998 biennial review, the Commission determined that the national TV ownership rule, as recently modified by Congress, remained in the public interest.[20] The Commission determined:

> The national networks have a strong economic interest in clearing all network programming, and we believe that independently owned affiliates play a valuable counterbalancing role because they have the right to decide whether to clear network programming or to air instead programming from other sources that they believe better serves the needs and interests of the local communities to which they are licensed.[21]

The Commission gave several additional reasons for retaining the national TV ownership rule. The Commission believed it was prudent to observe the effects of raising the cap from 25 percent to 35 percent, as well as other adjustments to the rules, before making further changes.[22] The Commission also determined that repealing the rule would "increase concentration in the

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18 142 Cong. Rec. 2,2232 (1996) (statement of Rep. Markey) (emphasis added).

19 Letter from Senators Fritz Hollings (D-S.C.), Trent Lott (R-Miss.), Daniel Inouye (D-Haw.), Ted Stevens (R-Alaska), Byron Dorgan (D-N.D.), Max Cleland (D-Ga.), John Edwards (D-N.C.), Conrad Burns (R-Mont.), Jesse Helms (R-N.C.), and Barbara Boxer (D-Cal.), and Representatives John Dingell (D-Mich.), Richard Burr (R-N.C.), Edward Markey (D-Mass.), and Chip Pickering (R-Miss.) to Michael Powell, Chairman, Federal Communications Commission (June 29, 2001). A copy of the letter is reproduced as Attachment 4.

20 *1998 Biennial Report*, at 11075.

21 *Id.*

22 *Id.* at 11073.

national advertising market" and "enlarge the potential for monopsony power in the program production market."[23]

Three of the major networks sought judicial review of the Commission's decision to retain the 35 percent cap. In *Fox Television Stations v. FCC*, the Court of Appeals for the D.C. Circuit remanded to the Commission for further consideration of the rule.[24] In so doing, the court rejected several arguments advanced by the networks:

- The court found that it was not "unlikely that the Commission will be able to justify a future decision to retain the Rule." The court specifically noted that the Commission's *1984 Multiple Ownership Report and Order* is now "almost 20 years old," and its conclusions may be "incorrect" or "inapplicable in the light of changed circumstances."[25]

- The court rejected the argument that the rule can be retained only on the basis of competitive considerations, and instead agreed with the Commission that it can base a decision to retain the rule on "diversity or localism" as well as competition.[26]

- The court held that the Commission had identified a plausible rationale for retaining the rule on competition grounds.[27]

- The court rejected outright the networks' argument that the national TV ownership rule violates the First Amendment. The court held that the rule is both constitutional and "reasonable."[28]

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[23] *Id.* at 11073 n.78.

[24] *Fox Televisions Stations, Inc. v. FCC*, 280 F.3d 1027, *reh'g granted* 293 F.3d 537 (D.C. Cir. 2002) (herein "*Fox Television*").

[25] *Id.* at 1048.

[26] *Id.* at 1042.

[27] *Id.* at 1048-1049.

[28] *Id.* at 1047.

B. A Major Economic Study Has Found That The National TV Ownership Rule Promotes Localism And Diversity

Professor Marius Schwartz of Georgetown University and Professor Daniel R. Vincent of the University of Maryland have produced a major study of the national TV ownership rule.[29] The following are among the key findings of their study:

- Programming decisions of non-network-owned affiliates ("affiliates") are more closely attuned to the interests of local viewers than programming decisions of network-owned-and-operated stations ("O&Os").

- The national TV ownership rule, in conjunction with the right-to-reject rule, fosters localism by limiting the ability of networks to dictate programming carried on local stations.

- Assertions that the debate about the national TV ownership rule is "just a fight about money" are incorrect. The national TV ownership rule does *not* appear to boost affiliate profits at the expense of network profits, but it *does* affect the programming choices of stations, and thus the programming viewed by local audiences.

- Broadcast television stations remain a significant force in the video marketplace, despite the growth of cable and DBS. Thus, so long as localism remains an important policy goal, the national TV ownership rule remains an important instrument for achieving that goal.

As explained in Part I.D below, Congress and the Commission have long pursued "localism" as a policy goal. That goal is satisfied not only (or even principally) by the production of local news and public affairs programming, but also by the production and selection of programs of all kinds to create a broadcast schedule designed to serve the tastes and needs of local viewers and by the influence independently-owned, community-responsive broadcasts bring to bear on network programming decisions.

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29 Marius Schwartz & Daniel R. Vincent, *The Television National Ownership Cap and Localism*, at 3 (January 2, 2003) (herein "Schwartz & Vincent"). A copy of the Schwartz & Vincent study appears as Attachment 1 to these comments.

Schwartz and Vincent analyze and disprove the assertion that O&Os and affiliates have the same incentives to serve the interests of each local viewing community. Although networks and their affiliates share many common interests, an affiliate will sometimes wish to depart from the network programming schedule to air a program that is more likely to appeal to its local audience or to preempt a network program that it believes to be unsuitable for the public it serves. In contrast, the network has an economic incentive to resist such preemptions because its income from national advertisers, as well as other sources such as syndication, foreign sales, and cable and Internet distribution, is maximized by obtaining widespread and synchronized clearance of its program schedule. Accordingly, Professors Schwartz and Vincent conclude that networks "have powerful reasons" to impose uniformity on affiliated stations.[30] If the network *owns* the station, it can simply impose its will and require the network programming to be aired even if an alternative program has greater appeal for the local audience. Non-network station owners lack the economic incentives to impose program uniformity on their stations and thus have the incentive only to ensure that their local stations offer the programming that best serves the stations' local viewers. In the words of Professors Schwartz and Vincent, "[c]hoices made by an independent affiliate typically will be more closely targeted to the interests of the viewers and local advertisers in its license area than would choices of a station owned or controlled by the network given that the network has a geographically much broader orientation."[31]

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[30] Schwartz & Vincent, at 3.

[31] *Id.*

Schwartz and Vincent conclude that "for purposes of advancing localism," the national TV ownership rule and the right-to-reject rule are "strongly complementary."[32] The right-to-reject rule prevents networks from obtaining control of the stations' programming decisions by contract. If the national TV ownership rule is eliminated, the networks will be free to achieve the very same result simply by *buying* the stations outright. Schwartz and Vincent conclude that "relaxation or elimination of the Cap will bring about greater uniformity of programming choices across the country compared to a model where more stations remain affiliates and – assuming the integrity of the Right-to-Reject Rule – preserve some discretion over programming."[33]

Schwartz and Vincent also analyze and reject the contention that the debate over the national TV ownership rule is "a fight about money," *i.e.*, affiliate and network profits. For the reasons explained above, the debate over the national TV ownership rule is about more than money: the outcome will affect the programs seen by local viewers. Furthermore, economic analysis reveals that the debate is not about money *at all*. Professors Schwartz and Vincent conclude that the national TV ownership cap does not appear to increase affiliate profits. They reach this result by applying the economic theory of bargaining. Although the network TV ownership rule tends to favor affiliates by taking away one of the "outside options" available to the network (the option to buy the affiliate or another local station in the event negotiations over an affiliation agreement are not successful), that effect is offset by the reduction in "joint profit"

32 *Id*.

33 *Id.* at 3-4.

available to be shared between the network and the affiliate. Indeed, Schwartz and Vincent conclude that the national TV ownership rule probably *reduces* affiliate profits to some extent.

Professors Schwartz and Vincent also conclude that the national TV ownership rule plays a role in promoting viewpoint diversity. Some stations in a local market have a much larger audience share than other stations within the same local market. These larger stations are likely to exert a larger influence on public opinion than are the smaller stations. Although an individual directly views only the programs aired by stations in her local market, she is affected *indirectly* by successful programs shown by other stations, particularly strong stations. For example, a viewer may hear people talk about or read reviews of popular programs on other stations, or be exposed to investigative news stories conducted by a station serving another market. If the national TV ownership rule were to be repealed and the networks were to acquire the strongest stations in markets across the country, the increased uniformity imposed by networks would limit the effective number of viewpoints available to the public.

Schwartz and Vincent also conclude that the growth of cable and DBS, as well as the increased number of independent broadcast stations, has not eliminated the need for the national TV ownership rule. The decisions of Warner Brothers, UPN, and Pax to enter the broadcast network field indicates that the broadcast network business is seen as robust. In May 2002, broadcast television accounted for 92 of the 100 top-rated prime-time programs. In November 2002, moreover, broadcast television accounted for 99 of the 100 top-rated prime-time programs, with cable's only program to make the list ranking 76th.[34] During the current

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[34] *See* Television Bureau of Advertising, Inc., Viewer Track, *Top 100 Programs on Broadcast and Cable: Nov-2002*, *at* http://www.tvb.org/rcentral/index.html (last visited Dec. 31, 2002).

2002-2003 season to date, the combined average viewership for the four major broadcast networks is almost six times as high as that of the top ten ad-supported cable networks.[35] Even new broadcast networks such as UPN and WB have audience shares larger than the largest ad-supported cable networks.[36]

Schwartz and Vincent find that "[t]he persisting importance of broadcasting" is also shown by its 71.5 percent share of advertising revenues in 2001, which greatly exceeds its 53.7 percent audience share. These figures show that "advertisers clearly value broadcast television exposure much more than cable exposure."[37] Professor Schwartz and Vincent conclude that a key reason advertisers prefer television to cable is that television delivers much larger audiences, thereby reducing duplication and allowing advertisers to achieve a given level of exposure with lower transaction costs.

Schwartz and Vincent note that "the growth rate of cable subscribership has flattened out, that the same is likely to occur with DBS, and that a simple extrapolation of trends suggests that the combined penetration of cable and DBS will peak at 80-85%," and that broadcast-network programs will continue to command a significant share of viewing even within cable homes.[38]

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35 *See* Television Bureau of Advertising, Inc., Viewer Track, *Season-to-Date Broadcast v. Cable Primetime Ratings: 2002-2003*, *at* http://www.tvb.org/rcentral/index.html (last visited Dec. 31, 2002).

36 *Id*.

37 Schwartz & Vincent, at 15.

38 *Id*.

As to independent stations, Schwartz and Vincent find that "the market position of the major broadcast networks relative to [independent television stations] seems, if anything, to have strengthened."[39] Although the audience share of the four major networks has fallen over the last 16 years, the share of independents (even including the newer and smaller broadcast networks such as WB, UPN, and Pax) has experienced a greater proportional drop. Moreover, stations affiliated with major networks attract larger audiences than independent stations in the same market. Network-affiliated stations benefit from being affiliated with a major network, and networks also tend to seek out the strongest local stations as affiliates. For these reasons, Professors Schwartz and Vincent conclude that independent stations are unlikely to offer an adequate alternative to allowing network affiliates flexibility to depart from network programming. Similarly, cable operators and DBS carry multiple cable networks that offer alternatives to the national programming of broadcasting networks, but currently carry limited local programming as compared to broadcast-network affiliates.

Schwartz and Vincent conclude that if the national TV ownership rule were lifted, "programming decisions would be aimed at a representative 'national viewer' rather than being oriented towards specific local markets, thereby sacrificing localism."[40]

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39 *Id.*

40 *Id.* at 16.

C. Empirical Evidence Supports The Findings Of The Schwartz & Vincent Economic Study

Real-world evidence from a variety of sources supports the conclusions of the Schwartz and Vincent study. The evidence presented here includes the results of an extensive NAB/NASA survey of affiliates and other real-world data and experiences.

1. An NAB/NASA Joint Survey And Other Evidence Supports The Study's Findings On Preemption

a) Affiliates Preempt to Serve the Tastes and Needs of Their Local Communities

In response to the NPRM, NAB and NASA conducted a joint survey of broadcast stations affiliated with ABC, CBS, and NBC.[41] A total of 201 stations responded to the survey, for a total response rate of 47.6 percent. The survey respondents represent a cross-section of all affiliates by size of market and by network affiliation.[42]

The survey provides extensive data about preemption by network affiliates. The survey defined preemption as "any instance in which your station has chosen to air contents of its own choosing instead of content offered by a network." On average, affiliates responding to the survey preempted 33.27 hours of network programming in 2001. The data show that the average hours of preemption decreased significantly during the 1990s, particularly after the national TV ownership cap was raised from 25 percent to 35 percent in 1996.

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41 A description of the survey methodology and a copy of the survey is provided as Attachment 2 to these comments. To preserve the rigor of comparison, the survey canvassed only affiliates in markets where all these major networks were represented.

42 The survey respondents include 62 ABC affiliates, 66 CBS affiliates, and 73 NBC affiliates.

TABLE 1

Preemption by Network Affiliates

Year	Average Hours Per Year
1991	47.75
1992	48.17
1993	48.97
1994	48.19
1995	46.40
1996	41.36
1997	37.47
1998	34.15
1999	34.41
2000	34.95
2001	33.27

Affiliates were also asked to report reasons for preempting network programming, selecting from a list of potential reasons or specifying other reasons for preemptions. The responses demonstrate that affiliates preempt network programming for a wide variety of reasons related to local interests.

TABLE 2

Reasons for Preempting Network Programming

Category	Percent of Respondents
Local Breaking News	83 percent
Local News	71 percent
Local Emergencies	70 percent
Local Political	74 percent
Local Sports	75 percent
National Breaking News	43 percent
Religious	47 percent
Unsuitability of Network Programming	18 percent
Other Public Affairs	27 percent
Other Local Programming	48 percent
Other (e.g., parades, telethons, syndicated programming, movies)[43]	34 percent

A large majority of affiliates (74 percent) stated that their most common reasons for preempting network programs had not changed in recent years.

Fully 68 percent of affiliates reported that they have "experienced pressure from [their] network to not preempt programming." Only 26 percent reported that they have not experienced such pressure. (The remaining 6 percent did not respond to this question.) Of those reporting that they experienced pressure not to preempt, 61 percent reported that the pressure had increased in recent years, 27 percent said there had been no change, 7 percent said that the pressure had decreased, and 4 percent did not respond.[44]

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43 A few of the responses to "Other" provided examples of preemptions that arguably could have fallen under one of the specified categories. These responses were not reclassified.

44 These percentages were corrected to account for six survey participants who responded that they had experienced an increase in pressure despite not responding affirmatively to the preliminary question of having experienced pressure. The correction results in a negligible difference: without the correction, 60 percent report an increase in pressure, 29 percent report no change, 7 percent report a decrease, and 4 percent did not respond.

The survey includes detailed examples of preemptions by affiliates. The affiliates were asked to provide five examples of situations in which they "preempted network programming and aired other content in order to better serve the tastes and needs of [the] local community." In all, the survey includes data on nearly 1,000 actual preemptions by affiliates. A complete listing of the examples is included as Attachment 2 to these comments. The examples provided by the affiliates are just the tip of the iceberg, but they demonstrate the value that non-network-owned affiliates bring to the local communities that they serve.

Many affiliates gave examples of preempting network programming for local political debates, election coverage, and other political broadcasts. One CBS affiliate reported that it "produced and aired the only televised mayoral debate in the 2001 election." Another reported preempting in February 2002 because of the "[h]uge viewer interest in the two candidates running" for mayor. The affiliates' dedication to bringing political debates to local viewers stands in stark contrast to the decisions of NBC and Fox to air their regular network programming (baseball and *Dark Angel*, respectively) instead of a 2000 presidential debate.[45] This year, the networks declined to carry President Bush's address to the nation on Iraq. Again many affiliates, responding to the interests of their viewers, chose to preempt network programming and air the President's address. As one CBS affiliate stated succinctly, "[w]e felt that what the President of the United States had to say on the Iraq situation was more important than a sitcom."

As expected, affiliates frequently reported preempting for breaking local news. From the Washington area sniper to the rescue of the Pennsylvania miners, the affiliates

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45 This incident is described in more detail *infra* pp. 23-24.

responded to local news events. One CBS affiliate reported that the town's mayor "told the community [that] lives were saved because of [the station's] coverage" of hurricane-caused floods. While O&Os also preempt for similar events, the evidence suggests that their preemptions may be fewer or shorter than those of affiliates.[46] Moreover, while O&O preemptions may be expected for breaking news events, O&Os rarely preempt for many other reasons that serve the tastes and needs of local communities but are strongly resisted by the networks.

The survey also revealed an additional aspect of local news that is often overlooked – locally produced news specials and features. One NBC affiliate reported preempting the network's *Dateline* program to bring its viewers a program about a station photographer who won an award from the National Press Photographers Association. An affiliate in Oklahoma City ran programs remembering the victims of the Murrah Building bombing on the first and fifth anniversaries of the attack. One NBC affiliate reported three locally produced specials. The first special, aired around July 4, reported on the military personnel who had returned from service in Desert Storm. A second special reported on the homeless problem in the city. In the third special, "[w]hat started as a news story about the high number of female teenage smokers became a campaign and challenge to a group of teenage girls" to quit smoking. Another station broadcast a special celebrating the fortieth anniversary of the integration of Little Rock Central High School. An affiliate in Cincinnati broadcast (in the place of *America's Funniest Home Videos*) a community event on riots in the city. This same station aired a one-hour special on health care in Cincinnati, examining a decline in the number

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46 See *infra* note 54 and accompanying text.

of doctors in the city. The station also aired a program called *College Tour* that reviewed the various higher-education institutions in the area. A station in Missouri preempted to broadcast the memorial of Governor Mel Carnahan. This station also preempted network programming in 1992 to broadcast Mikhail Gorbachev's dedication of a memorial in Fulton, Missouri to mark the end of the Cold War.

Affiliates preempt network programming to broadcast charity events. One station reported preempting to raise money for a historic downtown theater. Another annually broadcasts a program called *Coats for the Kids*, which airs in the holiday season and collects coats for needy children. A very large number of stations reported preempting for the Muscular Dystrophy Association telethon by Jerry Lewis. Here, again, the affiliates' practices diverge from the practices of the O&O stations – many O&Os have refused to air the MDA telethon. Several additional stations reported broadcasting locally produced telethons to raise money for victims of natural local disasters such as floods, tornados, and hurricanes.

The examples provided by the affiliates also frequently detail preemptions to broadcast local sports. One NBC station listed a sports preemption for each of its five examples and, in each, the respondent stated the reason was "huge local interest." Another NBC affiliate reported preempting to broadcast local sports because of a "[c]rosstown rivalry." A station in Missouri reported preempting the network's *Amazing Race* and a Garth Brooks special to give viewers "[o]ne of the few prime-time opportunities for Missouri basketball fans to see their top-10 rated team on broadcast TV." This same station has a "[l]ong-standing" practice of broadcasting local high school football games. An ABC affiliate stated that it broadcast local sports to permit college recruiters to view the local talent. A CBS affiliate broadcast a local NASCAR race because "NASCAR is [the] single biggest sporting draw in [the] market." Even when broadcasting nationally televised sports, the local affiliates' relationship with the networks permits them to bring to their viewers the programming they desire: a CBS affiliate became a secondary affiliate with Fox in order to broadcast NFL games when CBS did not offer football. It is hard to imagine the networks permitting an O&O station to air programming from a competing network.

As shown by the survey, affiliates also preempt where they feel network content is unsuitable for local viewers. When ABC announced it would be debuting a new program called *NYPD Blue*, there was concern from affiliates regarding the content. After discussions with ABC and a review of the pilot, ABC affiliate WFAA-TV determined that the material and language was inappropriate for programming scheduled to air at 9:00 p.m. in the Dallas market[47] For that reason, WFAA-TV did not carry the program for the entire first season, replacing it with a specially-produced local program, which was very costly for the station but successful in the market. ABC strongly objected to the station's decision and regularly made its displeasure clear to various executives of the station's licensee. Meanwhile other ABC affiliates were agitating against the rawness of the content and its presentation in the series. After one full year, WFAA-TV believed it had accomplished as much as it could and agreed to carry *NYPD Blue*, joining with other affiliates in continuing to monitor and influence its close-to-the-edge tendencies.

b) Available Evidence Shows that O&Os Preempt Less Frequently Than Affiliates

The Schwartz & Vincent study identified a need for data concerning preemptions by O&Os, as compared to preemptions by affiliates. NASA and NAB do not have access to

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[47] This information was not provided through the NAB/NASA survey, but through separate correspondence from the licensee.

preemption data for O&Os. Accordingly, on November 25, 2002, NASA and NAB filed a request for collection of data by the Commission.[48] The request asked the Commission to obtain information from the networks with respect to the amount of network programming preempted or otherwise not cleared by affiliates and O&Os in the top 25 markets in the years 2001 and 1991. On December 31, 2002, the Commission declined to compel production of the preemption information.[49] The Commission noted, however, that it "expect[ed] and encourag[ed] the networks to submit data on all relevant issues," which it said "encompasses the preemption information sought [by NASA/NAB]."[50]

The information that is available to NASA and NAB supports the conclusion that O&Os are much less likely than affiliates to preempt network programming. The NAB/NASA survey asked whether respondents previously had worked at an O&O. Among employees of affiliates who previously worked for an O&O, all of those who responded reported that their affiliate preempts more frequently than did their O&O. Every one of these respondents reported that the station manager at the affiliate has had more flexibility to make preemption decisions than did the station manager of the O&O.

Also, as noted above, carriage of charity telethons appears to have been largely foreclosed in markets served solely by O&Os. A Muscular Dystrophy Association representative, in a recent letter to Congress opposing an increase in the national ownership cap,

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48 A copy of the request appears as Attachment 3 to these comments.

49 *See 2002 Biennial Regulatory Review*, DA 02-3611, MB Docket No. 02-277 (rel. Dec. 31, 2002). For the convenience of the Commission, a copy of the order is included in Attachment 3.

50 *Id.*

stated: "[T]here are virtually no network owned and operated local stations that carry the [muscular dystrophy] Telethon."[51] He added: "To say it's difficult *now* to hold our *ad hoc* network together in face of the pressure the major networks are placing on their affiliates is an understatement."[52] Jerry Lewis recently sent a letter to Chairman Powell opposing an increase in the national ownership cap for the same reason.[53]

When it comes to coverage of breaking news, there is evidence that O&Os are likely to return to regularly scheduled network programming sooner than affiliates. For example, shortly after the D.C.-area sniper killed a fifth victim within a 16-hour period, all Washington television stations with news operations were veering in and out of the story. The *Washington Post* reported: "Surprisingly, NBC-owned Channel 4, the only one with a regularly-scheduled 10 to 11 a.m. newscast, opted to switch at 11 a.m. to its regularly scheduled 'John Walsh Show.' By then, schools were being locked down because the sniper was still at large, but WRC [Channel 4] ceded the story, at least temporarily, to its competitors . . . . The syndicated 'John Walsh Show,' which debuted a month ago and has been struggling in the ratings, is also owned by NBC."[54]

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51 Letter from Ken Sieve, District Director, Muscular Dystrophy Association, to Representative Ike Skelton (D-Mo.) (Aug. 15, 2000). A copy of the letter is provided as Attachment 5.

52 *Id.* (emphasis in original).

53 Letter from Jerry Lewis to Michael Powell, Chairman, Federal Communications Commission (Jan. 29, 2001). A copy of the letter is provided as Attachment 6.

54 *On a Distressing Day, Channel 7 Scoops The Competition*, WASHINGTON POST, Oct. 4, 2002, at C7.

These distinctions between affiliates and O&Os, which will be eroded through increased network station ownership across the country, are consistent with the networks' efforts to require clearance of network programs by affiliates that believe other programming would best serve their communities. Whereas affiliates sometimes are successful in resisting network pressure, O&Os have little ability or incentive to defy the interests and dictates of their network owners.

A telling example of the programming judgments made by the networks involves carriage of the first Presidential debate between then-Governor George W. Bush and then-Vice President Al Gore in 2000. When it became clear that NBC's broadcast of Game One of the American League Division Series would conflict with the first Presidential debate, NBC took the position that its O&Os and affiliates had to carry the game rather than the debate.[55] After the NBC affiliates resisted, NBC ultimately relented and agreed that affiliates would be permitted, if they chose, to preempt the baseball game for the debate. Some affiliates exercised this option to carry the debate, while others preferred to carry the baseball game. As one consequence of the affiliates' efforts, NBC's O&Os were afforded the opportunity to determine, on a station-by-station basis, whether to carry the baseball game or the debate. Many O&Os chose to carry the debate, but they would not have had that choice if the independent affiliates had not cleared the way.

NBC's efforts to deny its affiliates the choice of carrying the Presidential debate is a cautionary example of the networks' instinct to dictate programming choices at odds with the

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55 *See* Michael Carney, *NBC's Swing Vote: Network to Skip Debate for Baseball*, WASHINGTON POST, Sept. 23, 2000, at C1.

tastes and needs of local audiences. The affiliates were able to influence NBC only because a critical mass of television stations in larger markets remains in the hands of non-network owners. If the 35 percent national ownership cap were increased or eliminated, the already fragile ability of affiliates to sway networks to respect some level of local choice would be lost entirely. Indeed, Fox – which has already exceeded the 35 percent limit – instructed its affiliates to air the sci-fi series *Dark Angel* instead of the Presidential debate, and did not back down from its position. After much pressure, Fox agreed to feed the debate to affiliates, but only after 11:00 p.m. on a tape delay.

As another example, CBS has exerted strong pressure on its affiliates to obtain clearances of its low-rated, two-hour, news program, *The Early Show*. In this instance, by and large, the network has succeeded in pressuring affiliates to clear this program, despite its low ratings. With CBS's prior morning show, *CBS This Morning*, affiliates were permitted to insert substantial local news segments throughout the first hour of the program, thus providing viewers with a "blended" local-network news program. When CBS introduced *The Early Show*, however, it pressured affiliates to air the full two hours of the program with severely reduced local content (*e.g.,* five-minute local news segments at the close of each half-hour). This pressure has continued and intensified with the launch of a reformatted version of *The Early Show*. Because of continued efforts by the affiliate body, some local affiliates have so far retained the option of using the blended format, but CBS has made clear that it is phasing out this format for all affiliates and has refused to permit affiliates currently carrying the full program to move to the blended format. In addition, CBS has refused repeated affiliate requests to permit local affiliates to air only one hour of *The Early Show* to fully devote the second hour to local news, even though the local news programs generally achieve higher-ratings because the content is more compelling to local audiences.

The inflexibility of the networks with respect to preempting network programming is felt in the children's programming area as well. Each of the major networks provides their affiliates with three hours of core educational and informational children's programming to air in accordance with the Commission's requirements on children's programming. As part of the Commission's three-hours-per-week standard, when such programming is preempted by network sports coverage, affiliates are required to reschedule the preempted core children's programming to a "regular second home," and to notify the audience of the change in programming. While network sports preemptions are frequent, networks are reluctant to allow affiliates to preempt the network's other programs to satisfy the rescheduling obligation – even though it is the network preemption that created the need for rescheduling. For example, NBC affiliates faced this problem during weekends where network sports coverage (*e.g.*, Wimbledon tennis, Ryder Club golf) preempted both regularly scheduled core children's programming on Saturday morning as well as additional time on Sunday (a common second home for many stations). The network was unwilling to give affiliates permission to preempt three hours of other network programming to meet the rescheduling responsibility. Some affiliates worked out a partial accommodation that allowed them to obtain a network feed of the to-be-preempted core programming a week early, thereby at least giving the affiliates additional time to find a way to fit the programming into their schedules.

These examples illustrate the desirable influence local affiliates can and should exercise over program offerings in their service areas and the important counterbalance independent affiliates offer to the national orientation of the networks. This influence is based, ultimately, on the right-to-reject rule, other network-affiliate rules, and the affiliates' independent program discretion. Affiliates play an important role in preserving localism that O&Os are neither equipped nor motivated to play. Moreover, as the Presidential debate example demonstrates, affiliate influence and independence with respect to program content can bring greater flexibility for network O&Os, resulting in greater sensitivity to local needs by these stations as well.

2. Affiliates Engage In A Healthy Dialogue With Their Networks Concerning Network Programming

Even more pervasive than affiliates' scheduling choices, although ordinarily invisible to the Commission and the public, is the constant give-and-take between affiliates, alone or through their affiliate associations, and the networks with respect to the composition of network programming, the suitability of network program content for local communities, and the scheduling of network programs at times most appropriate for local audiences. These discussions are driven by affiliates, who have a long history of informing, cajoling and complaining to their networks when they believe network programming decisions conflict with the needs and particular sensitivities of local communities.

The board of each of the three affiliates associations comprising NASA frequently discusses programming issues during their board meetings. At NASA's request, each of the affiliate boards reviewed minutes of recent board meetings for discussions of programming issues, involvement of network representatives, and discussions of network actions based on affiliate concerns. As the following chart demonstrates, the business meetings of the three affiliate boards frequently include discussions of the content of network programming – each board discusses network content at more than 70 percent of the board meetings. The concerns of the affiliates also often translate into network action based on the affiliates' concerns.

TABLE 3
Discussion of Network Program Content
During Affiliate Board Meetings

Network	Year	Number of Meetings	Network Programming Discussed	Network Representative Present	Network Action or Decision Discussed or Reported
ABC	2000	6	4 (66.67%)	3 (50.00%)	4 (66.67%)
	2001	3	2 (66.67%)	2 (66.67%)	2 (66.67%)
	2002	4	4 (100.00%)	0 (0.00%)	4 (100.00%)
		13	10 (76.92%)	5 (38.46%)	10 (76.92%)
CBS	1999	10	8 (80.00%)	0 (0.00%)	4 (40.00%)
	2000	9	7 (77.78%)	0 (0.00%)	3 (33.33%)
	2001	2	2 (100.00%)	0 (0.00%)	0 (0.00%)
	2002	6	4 (66.67%)	1 (16.67%)	4 (66.67%)
		27	21 (77.78%)	1 (3.70%)	11 (40.74%)
NBC[56]	2000	6	5 (83.33%)	4 (66.66%)	4 (66.66%)
	2001	13	8 (61.54%)	4 (30.77%)	4 (30.77%)
	2002	14	11 (78.57%)	4 (28.57%)	6 (42.86%)
		33	24 (72.73%)	12 (36.26%)	14 (42.42%)

The frequent participation of the network representatives in the ABC and NBC board meetings demonstrate the value that the networks place on the views of the affiliates, and their role in molding the network's programming. Moreover, there are frequent one-on-one discussions by particular board members and other individual affiliates with network executives that these statistics do not reflect.

56 This chart does not include two meetings of the NBC Television Affiliates Association board for which meeting minutes could not be located (February 2002 and August 2001). Additionally, only partial year information was available for 2000; the chart includes information from August through December 2000.

This dynamic of affiliate feedback to and influence on the networks traditionally was healthy, contributing day in and day out to the quality and responsiveness of viewers' television service. While the affiliates have not always been successful in persuading the network to change its programming decisions, these discussions have resulted in programs that are edited, scheduled, or promoted through on-air announcements in a manner that is more suitable for family audiences than they would have been without affiliate input. Several examples illustrate the valuable input of affiliates and healthy give-and-take between networks and affiliates concerning the content of network programming:

- Last year, NBC broadcast a special edition of *Fear Factor*, featuring Playboy bunnies, during halftime of the Superbowl (airing on Fox). The NBC affiliates objected to the explicitness of the network promos, which ran during all hours of the day, and included tag lines like "who needs football when we've got bunnies?"

- This fall, CBS had scheduled the *Victoria's Secret Fashion Show* for 8:00 p.m. The affiliates objected to the early showing because of the mature nature of the content and urged that the program be moved to the 10:00 p.m. time slot. CBS ultimately moved the show to 9:00 p.m. In addition, some affiliates preempted the show because they felt that it was inappropriate content for their service areas.

- Promos for the NBC program *Dog Eat Dog* included shots of nude (pixilated) contestants promoting the program's challenges such as "strip football" and "strip golf." These promos, which ran at all times of the day, included statements such as "Somebody has to get a hole in one or they might have to get naked!" by host Brooke Burns. The NBC affiliates objected to the explicitness of the network promos and the context of the program, and NBC agreed to eliminate strip stunts from future episodes.

- *NYPD Blue* was originally designed to include much more nudity and graphic language than currently appears on the show. Following objections by ABC affiliates, the amount of nudity and graphic language was reduced. Moreover, a number of affiliates initially refused to carry the show altogether.

- NBC launched a trial program to accept liquor advertisements under certain circumstances. Because the network knew these spots would cause affiliate concerns, it voluntarily allowed affiliates to opt out. Many chose to do so, citing the particular sensitivities of the issue in their coverage area. Subsequently, NBC withdrew from the undertaking.

- Last year, the ABC affiliates complained repeatedly about the network's decision to continue to broadcast the program *Once and Again* although the show's ratings had plummeted. The affiliates expressed the concern that ABC was carrying the program not based on the merits of its network performance, but rather because Disney owned the program and was repurposing it on a cable network at the same time it was being aired on ABC. The show ultimately was cancelled, but only after repeated complaints from affiliates.

- Affiliates have concerns about the violent and mature content of NBC's upcoming series *Kingpin*, which chronicles the life of a drug lord. To address these concerns, NBC has agreed to allow affiliates to review episodes in advance to ensure the content is appropriate for their local communities.

- When CBS decided to reformat its morning news program, *The Early Show*, in 2002 in an effort to improve its ratings, a sub-committee of the CBS affiliates association board was designated to meet with the network to convey affiliate input and concerns with respect to the morning program. This committee met several times with CBS representatives to discuss the network's future plans and to provide affiliate input with respect to the format and content of the news program. One key issue of affiliate concern was the ability of local affiliates to provide significant local news content during the two-hour time block occupied by the morning program.

- ABC affiliates frequently complain to the network when they believe the network's news coverage is lacking in quality or quantity, a role that cannot be expected to be played by ABC O&Os.

- The NBC affiliates expressed early concern about NBC's decision to require live clearance of the XFL games. On the west coast, games preempted both the affiliates' early evening local news and the national network news for over a quarter. In other parts of the country, overruns of the XFL interfered with the 11:00 p.m. local news. The affiliates, in an effort to support NBC's investment in the XFL, supported the XFL for one season. This is an example of the stations appreciating their interest in presenting a strong national network. But it was clear that the local affiliates would not support the series another season. Affiliates raised similar concerns about time slot for Arena Football (which begins airing in February 2003) because overruns would preempt the 6:00 p.m. local newscasts in the eastern time zone. As a result, the network has agreed to work with the sports league to ensure the games do not run over.

- NBC took the position that all competitions in the 2002 Olympic Games should be shown live, even on the west coast where it would preempt the early evening local news. West coast affiliates strongly believed the events should be broadcast on a delay, during prime time, to avoid disruption of the news and accommodate viewer preference. After resistance from the NBC affiliates and at their suggestion, the network conducted a survey of viewers, the results of which demonstrated that west coast viewers preferred a delayed broadcast. As a result,

> NBC agreed to the delay, and west coast NBC affiliates were able to continue to broadcast local news during the Olympics. If NBC had owned more west coast stations, the critical mass of objection might never have materialized.

As network station ownership increases and, consequently, reliance on affiliates decreases, networks become less and less sensitive to affiliate input – which typically serves as a proxy for local viewer input. Network ownership of stations in excess of 35 percent would effectively eliminate affiliate input into the network schedule. As shown by the NBC and Fox examples in connection with the Presidential debate, as well as by some of the other examples above, even at 35 percent the affiliates' ability to influence network programming is precarious.

3. Networks Have Greatly Expanded And Consolidated Their Power And Influence In Recent Years

The years since 1996 have witnessed tremendous growth and consolidation of network power and influence. As a consequence of unprecedented horizontal and vertical integration, the industry is now dominated by four companies aligned with the big four networks: Walt Disney Company (ABC), Viacom (CBS & UPN), Fox Entertainment Group (Fox), and General Electric (NBC). Through their acquisition of television stations, aggressive integration with programming producers and syndicators, and intrusion into other media, these companies have increased their power over the production and distribution of content, obtaining greater leverage over independently owned affiliates. An increase in the 35 percent ownership cap would further enhance network leverage over affiliates, resulting in a diminution of locally-oriented television service.

a) Networks Have Increased Their Ownership Of Broadcast Stations

With the relaxation of the national ownership restriction, the networks (or their parent companies) have acquired more and more television stations across the country. Viacom currently owns 39 stations, Fox has 37, General Electric holds 26 (counting its recent acquisitions of Telemundo stations but excluding its 32 percent interest in Paxson stations), and Disney owns 10.[57] The companies' ownership is concentrated in the largest markets. In the top four markets (New York, Los Angeles, Chicago, and Philadelphia), all four major network stations are O&Os, and not a single independently-owned network affiliate remains. Together, the companies own at least one station in 24 of the top 25 markets. Viacom and Fox already exceed the 35 percent ownership cap. Using current DMA data and attributing UHF stations with a 50 percent audience reach, Viacom nets 39.9 percent of U.S. households, and Fox's total exceeds 37.8 percent. Putting aside the "UHF discount," Viacom- and Fox-owned station signals reach approximately 45.2 percent and 44.4 percent of total U.S. television households respectively. General Electric- and Disney-owned stations reach approximately 36.5 percent and 23.8 percent respectively. More than 61.7 percent of all U.S. television households are located in market areas served by a station owned by one of these four companies.

b) Networks Have Increased Their Ownership And Control Of Program Producers

The networks view station ownership as key to obtaining greater control over the distribution outlets for network programming,[58] an aspect of the industry they have dominated

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[57] A chart of station ownership compiled from information in the Television and Cable Factbook 2002 and Nielson Media Research's Local Universe Estimates for 2002-2003 *at* http://www.nielsonmedia.com/DMAs.html (last visited Jan. 1, 2003), appears as Attachment 7. The remaining information in the paragraph above derives from the chart.

[58] *See* Mara Einstein, Assistant Professor of Media Studies, Queens College, Viewpoint, *CBS-Viacom Link Continues Diversity Erosion*, NEWSDAY, Sept. 16, 1999, at A50 ("Networks want to ensure that they have outlets for their programing [sic] so they buy more and more television stations."); Andrew Collier, *Peacock Looking to Get 'Fangs' in Station Groups*, HOLLYWOOD REPORTER, Sept. 15, 1997, at 4 (networks view ownership of station groups as a way to get greater control of the "distribution system" and quoting former NBC executive as stating, "I think they want as much control as they can get in the stations that carry them . . . . They want to get their fangs in as many stations and station groups as they can.").

since the repeal of financial interest and syndication ("fin/syn") rules.[59] The growing vertical integration of the networks gives them: (1) more power over their affiliates and (2) economic incentives to ensure that their interests in one platform or business are furthered in their other platforms or businesses. Both of these trends contribute to a loss of broadcast television service tailored to local viewers. (NAB takes no position with respect to the arguments in this subsection.)

Since 1989, the number of suppliers of prime-time network programming has shrunk by half, to just 10 companies.[60] The networks own four of the remaining companies, and they now supply 64.2 percent of the big-four networks' prime-time content.[61] The share of big-four prime-time content supplied by the remaining independent companies has dwindled to 14.3 percent.[62] Universal Television appears to be the only major independent supplier of prime-time network programming that remains viable.[63]

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[59] *See In re Review of the Syndication and Financial Interest Rules*, 10 FCC Rcd 12165 (1995) (approving immediate repeal of remaining financial interest and syndication rules); *In the Matter of Evaluation of the Syndication and Financial Interest Rules*, 8 FCC Rcd 3282 (1993) (eliminating many of the financial interest and syndication restrictions and setting timetable for repeal of remaining restrictions).

[60] *See* Mara Einstein, *A Historical Perspective on Program Diversity*, Media Ownership Working Group Study at Table 2 (2002).

[61] *See id*. at Table 4.

[62] *See id.* at Table 2. Movies make up the remaining percentage of prime-time programming. *See id.* at 26.

[63] *See* Michael Freeman, *Nets Keep It In the Family; Vertical Integration Still Strong, But Universal Benefits From Independence*, ELECTRONIC MEDIA, May 20, 2002, at 3 (reporting that Universal is selling 10 television series for the 2002-2003 season, and quoting Universal's president of programming as saying "The fact that all of the other independents of our size folded this year (including Michael Ovitz's Artists Television Group) ultimately created greater (continued…)

Vertical integration is a significant economic factor in other areas. The top four networks relied almost entirely on co-owned Hollywood studio counterparts for the 2002-2003 season comedy and drama pilots.[64] The companies' vertically integrated network and studio combinations are responsible for the bulk of the 2002-2003 season's programming hours. Walt Disney's Touchstone subsidiary reportedly is producing six of the seven new shows on ABC's schedule.[65] Overall, Touchstone is producing 12 series for all of network television.[66] Fox's in-house television production studio, 20th Century Fox Television, is the leading supplier of prime-time programming for the 2002-2003 season, with 19 scheduled series.[67] Fox's 20th, Regency, STF Productions, and Fox TV Station Productions are producing a total of 25 shows, or 18 hours of prime-time programming, for all outlets this season.[68] Viacom's various production arms, including Paramount Network TV Productions, CBS Productions, Viacom

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(footnote cont'd)

opportunity for us because we are the only major suppliers who can freely program for a broadcast network and any of our cable networks.").

64 *See* Joe Schlosser, *Do-It-Yourself Development: Broadcast Nets Turn To In-House Studios For The Production of Next Fall's Pilots, Shows*, BROADCASTING & CABLE, Feb. 11, 2002, at 12. *See also*, Editorial, *Eisner Strategy Won't Save ABC Electronic Media*, Oct. 7, 2002, at 9 (stating that 22 of ABC's 23 pilots for the 2002-2003 season were produced inhouse).

65 *See* Diane Mermigas, *Fin-Syn Repeal Has Yet To Pay Off*, ELECTRONIC MEDIA, June 3, 2002, at 30.

66 *Id.*

67 *Id.*

68 *Id.*

Productions, Spelling, Big Ticket, and CBS News, is supplying 35 shows and 28 hours of programming to all TV dayparts.[69]

Networks are using "their powerful position as gatekeeper to the American viewing audience" to demand a financial interest in programs that appear on the network, which gives them the ability to control renewal terms and make money on the "back end" (that is, revenues derived from selling the rights to air the program after it has been shown on network television).[70] According to a report available in June 2002, networks have increased their economic interests in their 2002-2003 programming schedules to "alarmingly high" levels.[71] CBS has a 91 percent stake in its total network schedule this season, representing 23 shows and 20 hours of programming; Fox has a 72 percent stake in its total network programming schedule, or 18 shows representing 13 hours; ABC has a 62 percent stake in its total network schedule, or 23 shows representing 19 hours; and NBC has a 52 percent stake in its network programming schedule, or 23 shows representing 19 hours.[72] Industry executives believe that network

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69 *Id.*

70 Mara Einstein, *The Program Selection Process*, Media Ownership Working Group Study at 52, 21, 23 (2002). *See also id.* at 34 (noting that syndication traditionally has been a major profit source for hit television show owners).

71 *See* Diane Mermigas, *Fin-Syn Repeal Has Yet To Pay Off*, ELECTRONIC MEDIA, June 3, 2002, at 30.

72 *Id.* (citing a report by Merrill Lynch analyst Jessica Reif Cohen). The article also reports that UPN's interests in its programming are 67 percent and that the WB's interests stand at 47 percent. These numbers are not anomalous. During the 2000-2001 season, "a record of 24 of 37 new series [were] either owned or co-owned by the television networks which [aired] them and Disney own[ed] or co-own[ed] an interest in 3 out of 4 of ABC's new programs; CBS own[ed] an interest in 6 out of 7 new shows; NBC own[ed] an interest in 4 of 7 new shows; 20th Century Fox own[ed] or co-own[ed] 5 of Fox's 9 new shows; Paramount [produced] 2 of UPN's 4 new series; [and] Warner Brothers [owned] or co-own[ed] 4 of 6 new shows for WB." *1998 Biennial Report*, Statement of Commissioner Gloria Tristani Dissenting in Part.

ownership of a program contributes to the network's decision to select the program over other competing programs and leads the network to keep the show on its schedule longer than it otherwise would.[73]

In addition, all four networks either have ties to major syndicators or have developed their own syndication divisions, and thus, through their syndication units, control what appears during many non-network program hours.[74] As a result, far fewer syndicators – from dozens in 1996 to fewer than 10 today – control significant amounts of content, and most of those that remain are tied to the networks.[75] These ties give the networks incentives to obtain national outlets for their syndicated content by placing it on their O&Os and affiliated cable networks, which diminishes opportunity for competing programmers and program syndicators to build a national footprint for their product.[76] The shrinking independent syndication market also

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73 Mara Einstein, *The Program Selection Process*, Media Ownership Working Group Study at 24 (2002).

74 *See* David Hatch, *Syndie Indies Fight the Good Fight*, ELECTRONIC MEDIA, Jan. 24, 2001, at 1 (recognizing trend of networks developing syndication units); Greg Spring, *Death of the Indies*, ELECTRONIC MEDIA, Mar. 29, 1999, at A1 ("Industry consolidation . . . is nothing new to the TV business. But one of the areas hit hardest by this trend is the syndication industry, where access to major studios for product and to station groups for output has oftentimes meant the difference between life and death."); Melissa Grego, *Cook in Busy Fox Syndie Kitchen*, VARIETY, Oct. 30-Nov. 5, 2000, at 17 (stating that the function of Twentieth Television, Fox's syndication arm, "is not only to sell Fox off-net product into syndication, but also to develop and produce shows that can be rolled out nationally and are tailored to the needs of Fox TV O&Os.").

75 *See* Hatch, *supra* note 74; Spring, *supra* note 74 ("[t]he major independent syndicator, already an endangered species through the late 1990s, could slip into extinction with the coming of the new millennium" and quoting executive of company that owns a handful of television stations as stating: "We're down to very few distributors as it is . . . . We love diversity, we love variety and we love choice, and we're getting less of all those things.").

76 As to Fox, the tie between network owned syndicated content and network owned and operated stations is demonstrated by Fox's corporate personnel structure: the executive in (continued…)

means that loss of affiliation is an even more severe penalty for a broadcast television station. The four major networks control the network programming supply, and now they control the supply of first run and off-network syndicated programs.

c) Networks Have Increased Their Ownership And Control Control Of Cable Networks

The networks and their parent companies also have or are building extensive holdings in domestic cable networks. Together, the four companies own, or have interests in, 9 of the 21 cable networks that made a leading industry journal's 2002 top-25 television networks list.[77] (The remaining four networks on the list, ranking first, third, fourth, and sixth, were the big four networks themselves.) The Walt Disney Company, whose chairman Michael Eisner recently announced plans to merge the management of ABC with its sister cable networks,[78] owns ABC Family, the Disney Channel, Toon Disney, Playhouse Disney, and SoapNet.[79] It has interests in ESPN and its related channels, Lifetime Television and its spinoffs, A&E, The

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(footnote cont'd)

charge of Fox syndicated content reports to the executive in charge of Fox owned and operated stations.

[77] *See* John M. Higgins, *Biggest Still Holding Their Own*, BROADCASTING & CABLE, Dec. 2, 2002, at 12 (rankings based on estimated 2002 revenue). The ranked cable networks and the companies that own or have interests in them are ESPN (Disney), Nickelodeon (Viacom), Showtime (Viacom), MTV (Viacom), Disney (Disney), Lifetime (Viacom), A&E (General Electric and Disney), CNBC (General Electric), and Fox News (Fox). *Id.*

[78] *See* Steve McClellan & Dan Trigoboff, *Eisner Touts "National" Duops*, BROADCASTING & CABLE, Oct. 7, 2002 (quoting Eisner as saying "Each one of our dayparts at the ABC network will be run horizontally with the same businesses in cable").

[79] The Walt Disney Company 2001 Annual Report.

History Channel, The Biography Channel, and E! Entertainment Television.[80] General Electric owns CNBC, MSNBC, and recently purchased Bravo.[81] It has equity investments in A&E, The History Channel, and the National Geographic Channel.[82] Fox Entertainment Group owns the Fox News Channel, FX Network, and the Fox Movie Channel.[83] It has interests in the Speed Channel, Outdoor Life, and the National Geographic Channel.[84] Fox also operates a national sports programming service in Fox Sports Net.[85] Viacom owns and operates MTV, MTV2, Nickelodeon, TV Land, VH1 Music First, CMT: Country Music Television, The New TNN: The National Network, BET Cable Network, BET Jazz: The Jazz Channel, Showtime, The Movie Channel, and FLIX.[86] In addition, Viacom owns and operates several multiplexed versions of Showtime, and the Movie Channel is a joint venturer in the Sundance Channel and Comedy Central.[87] Calculated from the beginning of the year through September 20, 2002, the sum of

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[80] *Ibid.*

[81] General Electric Company's Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the fiscal year ending Dec. 31, 2001; Allison Romano, *Bravo! NBC Has a Cable Net*, BROADCASTING & CABLE, Nov. 11, 2002, at 12-13; *Mass Media*, COMMUNICATIONS DAILY, Dec. 10, 2002, at 7 (reporting that NBC closed on $1.25 billion acquisition of Bravo).

[82] *See* General Electric Company's Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the fiscal year ending Dec. 31, 2001.

[83] *See* Fox Entertainment Group, Inc.'s Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the fiscal year ending Dec. 31, 2001.

[84] *Ibid.*

[85] *Ibid.*

[86] *See* Viacom Inc.'s Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the fiscal year ending Dec. 31, 2001.

[87] *Ibid.*

the four companies' prime-time, total households viewership audience, including both broadcast and cable, is 71.3 percent.[88]

4. The Increasing Power Of The Networks Is Reflected In Their Increasing Encroachment On Affiliates

Since 1996, when the national TV ownership limit was increased from 25 percent to 35 percent, the balance of power between networks and affiliates has shifted further in the direction of the networks. This increased leverage has been accompanied by increased network encroachment upon and stiffer restrictions on affiliates' ability to carry non-network programming responsive to their local communities. In negotiating affiliation agreements with their affiliates, the networks have increasingly demanded provisions that effectively require affiliates to air network programming, rather than locally selected programming, in all but the narrowest of circumstances. (NAB takes no position on this controversy, which NASA has raised separately with the Commission in a Petition for Inquiry filed on March 8, 2001, and in Early Comments and Motion for Declaratory Ruling filed on June 22, 2001 (DA 01-1264). Changes in the standard affiliation agreements that have occurred over the course of that proceeding were summarized in an Update of Record filed by NASA in that proceeding on December 16, 2002.[89] While that proceeding pertains directly to whether the network affiliation provisions comply with the Commission's rules and the Communications Act, the provisions are cited here to show the importance of retaining the 35 percent ownership cap.)

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[88] *See The Corporate Scoreboards: How Viewship Breaks Down by Company*, BROADCASTING & CABLE, Dec. 2, 2002, at 12 (reporting calculations of Morgan Stanley Analyst Richard Bilotti).

[89] The affiliation agreement provisions discussed in this section are attached to NASA's June 22, 2001 filing in DA 01-1264, and NASA incorporates them into these comments by reference.

Networks have implemented this strategy in two ways. *First*, they have established "baskets" of allowable preemptions of a certain number of hours per year. If the affiliates exceed their preemption baskets, they are subject to financial penalties or even potential loss of affiliation. In the case of Fox, the limitation is two preemptions per year. The standard NBC agreement establishes a basket of five hours of prime-time preemptions per year. The networks also have expanded the definition of what constitutes a preemption – so that *any* decision not to accept or air network programming at the dates and particular times specified by the network counts against the preemption baskets – and have increased the pressure against affiliate decisions to refuse network series that they may find unsuitable for their local communities.

Second, the affiliation agreements of all but the CBS Network contain provisions that hedge, complicate and, in NASA's view, improperly trench on the Commission's right-to-reject rule, which provides that the networks may not impose agreements that "prevent" or "hinder" affiliates from rejecting network programming that the licensee finds to be unsatisfactory, unsuitable or contrary to the public interest, or from substituting for network programming "a program which, in the station's opinion, is of greater local or national importance."[90]

As an example of these trends, if a Fox affiliate makes or even indicates that it intends to make more than two "unauthorized" preemptions within a 12 month period – or if Fox "reasonably concludes" that such preemptions will occur – Fox may terminate the affiliation on 30 days notice. Although the Fox agreement facially preserves the affiliate's right to reject

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[90] 47 C.F.R. § 73.658(e).

network programming, it applies a restrictive meaning to "unsatisfactory or unsuitable" programming and otherwise constrains those preemptions that may qualify as "authorized." NBC requires the affiliate to stipulate at the outset that it "does not presently foresee any need" to preempt network programming except for "live coverage of local news events" and then goes on to require the affiliate, if it preempts a program without NBC's approval, to reimburse NBC in "an amount equivalent to NBC's loss of gross advertising revenues attributable to Station's failure to broadcast such programs in Station's market." Thus, unless NBC approves the preemption, the affiliate must reimburse NBC for revenue NBC did not receive from broadcast of the program – a practice criticized by the Commission in its *Chain Broadcasting Report* as an example of interference with an affiliate's independent exercise of its ability to make programming decisions: "This clause effectively removes all monetary incentive to substitute local commercial [programs] for network commercial programs."[91]

As an additional example, in the 1999-2000 season NBC required its affiliates to accept or reject an entire night of prime-time programming. Affiliates could not make programming selections, as to individual programs or even entire series, on grounds of taste, viewer preference, the availability of programming of greater local or national interest, or any other consideration.

The ABC affiliation agreement requires full-line, live clearance of "all the programs supplied by ABC," ostensibly subject to the right-to-reject rule. For a single unapproved preemption, however, ABC can trigger a seven-day window during which the affiliate either must resume full-line clearance of all network programming or risk severe

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[91] *Chain Broadcasting Report*, at 38.

penalties up to and including termination of the affiliation. The effect, of course, is to chill all preemptions by affiliates. As a result, ABC affiliates wishing to avoid loss of their affiliation may forgo broadcasting reports from members of Congress, governors or mayors to their constituents, documentaries, civic events, charity telethons, religious programs, local high school and college sports events and other programs of greater local or national interest.

In addition, network programming increasingly is repurposed on other video platforms (in which the network has a financial interest) immediately before, concurrently with, or immediately after the networks require it to be carried by affiliates. With the exception of CBS (based on a negotiated arrangement for NFL football and subject to exceptions), the networks have refused to allow affiliates to preempt a network program that it will repurpose, even though this means that the program will be available to the public on other media in the same general time frame as it would be available on the affiliate. The affiliates have requested reasonable time and geographic exclusivity for network programs, but with the exception of CBS (and not with respect to all of its programs), the networks compel affiliate clearance of all network programs – even if the programs are being shown by the network on other stations (via co-owned affiliated broadcast networks), cable systems, or satellite systems within the station's service area – or risk breach of their affiliation agreements or other sanctions.

Fox has insisted on the ability to control every megabit of its affiliates' digital channels to use for any purpose it desires, apparently including cellular phone or data service, and if the affiliate does not agree to carry all of Fox's content, it runs the risk of losing its Fox affiliation for both analog and digital programming. In addition, Fox has told its affiliates that they should not make long- or even middle-range plans for programming in the 4:00 to 5:00 p.m. weekday time slot because it reserves the right to reclaim that time slot on six months' notice for network programming. NASA has contended in connection with its Petition for Inquiry (DA 01-1264) that this practice violates the FCC's option-time rule,[92] but the point here is that it constitutes further encroachment on affiliates' programming discretion and control of their stations. (NAB takes no position on the lawfulness of these arrangements).[93]

The emergence and acceleration of these trends, further evidenced by the results of the NAB/NASA survey (discussed in Part I.C.1 above), have accompanied and been abetted by the increase in network ownership of local stations, their growing power and stake in program production and syndication rather than service to local communities, and their strategies of leveraging off of their broadcast interests to advance their interests in cable and other businesses. The larger the networks' ownership stake in local stations, the smaller the base of independently-owned affiliates to push back against the influence of the networks' other business interests.

In addition to restraining affiliates' ability to preempt network programming in favor of local content, the networks often "preempt" the affiliates' locally produced programming by overrunning their network time. In an effort to demonstrate the frequency of this practice for purposes of these comments, NASA sought information from affiliated stations about the network overruns in 2001 and 2002.[94]

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92 47 C.F.R. § 73.658(d).

93 In their affiliation agreements, Fox and NBC reserve the right for whatever reason to refuse to permit a station to assign an affiliation agreement to a qualified buyer of the station. This right gives them the power to exercise certain attributes of station control. Until the recently-negotiated ABC affiliation agreement that provided for affiliate payments to support ABC's carriage of *Monday Night Football*, ABC insisted on a similar provision in its affiliation agreements.

94 To gather this information, NASA contacted general managers with reliable and accessible programming records. These managers then reviewed their programming records for instances where network programming overran into local time. Because a network overrun has a (continued…)

An ABC affiliate reported that in 2001 its local news programming was completely preempted eight times by network overruns. On 26 other occasions, the local news was delayed, by an average of 32.5 minutes. (These preemptions do *not* include Monday and Saturday night football.) In total, local news was delayed more than 14 hours. These overruns were caused by college football, the *Academy Awards*, the premier of *Alias*, and other network programs. In 2002, local news was preempted completely 11 times.[95] An additional 24 news programs were delayed an average of 34.7 minutes (again excluding Monday night football). In total that year, local news was delayed more than 13 hours. The overruns in 2002 were caused by college and preseason football, movies, and the *Academy Awards*.

A Fox affiliate reported that in 2001 the network overran local programming 31 times. Twenty-five overruns were caused by sports, four by movies, one by the *Billboard Awards* and, understandably, one by the State of the Union address. In 2002, the Fox Network overran local programming on 36 occasions. Movies caused six overruns, sports was responsible for 28, and the *Essence Awards* accounted for one. Again, one overrun was the result of the State of the Union address.

An NBC affiliate reported that in 2001, network sports programming overran and completely preempted local news 36 times.[96] In an additional 17 instances, the local news was delayed by NBC's sports programming. The delays averaged 12 minutes each and totaled more

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(footnote cont'd)

uniform effect across all affiliates, it was not necessary to survey all affiliates as to network overruns.

95 In one instance, this affiliate ran the program at an alternative time.

96 This affiliate did not report on non-sports programming overruns.

than 200 minutes. In 2002, NBC's sports programming totally precluded the local news 41 times. The local news was delayed an additional 20 times by NBC's sports overruns. The total delay was 177 minutes – an average of nearly nine minutes per overrun.

5. The Evidence Indicates That Affiliates Out-Perform O&Os In The Quality Of Local News And Public Affairs Programming

The Commission's Media Ownership Working Group recently released a study suggesting that: (1) the performance of O&O stations and affiliates is virtually identical with respect to the ratings of early evening newscasts; (2) O&Os outperform affiliates with respect to the receipt of awards for local news operations; (3) O&Os appear to produce, on average, a greater quantity of local news and public affairs programming than do affiliates in markets where the two stations types compete directly; and (4) within the class of affiliates, affiliates co-owned with newspapers rate higher under the study's measures of quality and quantity of local news programming than do other network affiliates.[97] For the reasons explained in the next section, the Commission's localism policy is not and should not be limited to local news programming, but instead extends to programs of all kinds responsive to community tastes and needs. There is, however, a more basic objection to the Working Group study: NAB and NASA have analyzed the study and demonstrated that it uses flawed data and methodology and that its conclusions therefore are invalid.[98]

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[97] Thomas C. Spavins, Loretta Denison, Scott Roberts & Jane Frenette, *The Measurement of Local Television News and Public Affairs Programs*, Media Ownership Working Group Study (2002). NAB and NASA did not evaluate the study's finding concerning affiliates co-owned with newspapers, and it is not addressed by what follows.

[98] A copy of the NAB/NASA analysis, which was filed with the Commission on December 9, 2002, is attached to these comments for the convenience of the Commission as Attachment 8.

The most important flaw in the study is that it fails to hold constant the size of the market, which has a significant effect on the amount and type of news programming aired by both O&Os and affiliates. The study thus falls prey to one of the most common mistakes in economic reasoning, the "failure to hold other things constant." This error undermines every section of the study.

As to the *quantity* of local news programming, the study's own data show (and common sense suggests) that television broadcast stations in larger markets tend to air more hours of local news programming than do television broadcast stations in smaller markets. Moreover, the networks own a disproportionate number of stations in large markets (including 70 percent of network stations in the top 10 markets). By failing to correct for market size, the study gives O&Os undue credit for additional hours of local news programming that are properly attributable to the size of the local market.

There are additional methodological and data mistakes in the study. Fox stations (both O&Os and affiliates) are included in the study even though they exhibit a remarkable variation in hours of news programs when compared with the other networks. Many of the Fox-owned stations were recently acquired by the network. These stations may still be in a transitional phase. Moreover, they may have been selected by Fox precisely because they already had established a strong local news presence. For all these reasons – variable data, transitional stations, and the likelihood of "selectivity bias" – and perhaps others, the Fox stations should have been excluded from the study. In addition, the study misclassifies a number of stations: an affiliate is classified as an O&O; independents are classified as affiliates; a WB affiliate is classified as a major network affiliate; and stations in markets with no O&Os are included in the study.

When these mistakes are corrected, the study's finding that O&Os air more hours of local news programming than affiliates is shown to be incorrect. Indeed, there is no statistically significant difference in the *quantity* of local news programming aired by ABC, CBS, and NBC O&Os versus affiliates.

As to the *quality* of local news programming, the error in the study is even more dramatic. Again, the study's basic flaw is failure to correct for the size of the market. The study's analysis assumes that every station it considered had an equal chance of winning an award. In fact, stations in large, urban markets are much more likely to receive awards than stations in smaller markets. For example, nearly 50 percent of the "Dupont Silver Baton" awards for local news excellence in broadcasting were awarded to stations in the top 10 markets. As noted above, networks own a high percentage of the stations in larger urban markets.[99] Thus one would expect O&Os to receive a high percentage of Dupont Awards simply because they represent a high percentage of large-market stations. It turns out that O&Os account for 70 percent of the network stations in the top 10 markets, yet they received only 54 percent of the Dupont Awards to network stations. In contrast, independently-owned affiliates account for only 30 percent of network-affiliated stations in those markets, and yet they won 46 percent of the Dupont awards to network stations. In other words, affiliates significantly *outperform* O&Os in the 10 largest markets.

Viacom, NBC, and Fox submitted a response to NASA's and NAB's early submission of the Working Group study, in which Economists, Inc. ("EI") confirms that the

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[99] *See supra* note 57 and accompanying text.

methodology employed by the Working Group study was flawed.[100] On February 2, 2003, NASA and NAB will reply in more detail to the response by Fox, NBC, and Viacom. By that time, EI will presumably have provided to the public the dataset it developed. At this point, NASA and NAB merely note that EI agrees that a key methodological mistake in the Working Group study was its failure to hold constant the size of the broadcasting market. EI recognizes that "[t]he hypothesis that market size affects television stations' news output is plausible and worth considering."[101] Having "considered" the hypothesis, the networks' economists "confirm that market size is a significant factor in explaining stations' news output."[102] And EI does not dispute that this flaw led to the erroneous conclusion that O&Os receive more news awards than affiliate stations. The economists present no rebuttal to the fact that, holding market size constant, O&Os received significantly fewer of the prestigious Dupont awards than affiliates. The best response they could offer was that in the past two years, O&Os received only slightly fewer RTDNA awards than affiliates.[103]

In sum, the conclusions of the Working Group Study are invalid and should not be relied upon by the Commission. The data reported in the study do, however, provide a basis

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[100] *See* Response of Fox, NBC/Telemundo, and Viacom to Early Submission of NAB and NASA (filed Dec. 19, 2002).

[101] *Id.* app. 1 at 3.

[102] *Ibid.*

[103] EI dismisses the idea that Fox stations should be treated separately when analyzing the hours of local news programming by network stations. EI also described the results of regression analysis that bundled Fox with the other networks. But the hours of local news programming by Fox is clearly different than NBC, CBS, and ABC, and it is reasonable to be concerned about introducing self-selection bias by including Fox stations.

for concluding that the quality of affiliates' local news programs may be superior to that of O&Os.

D. Congress And The Commission Have Long Been Committed To Localism As A Policy Goal

The Schwartz and Vincent study and the evidence supporting its conclusions demonstrate that the 35 percent national TV ownership cap preserves localism and that local autonomy would be lost if the national networks could engage in the unrestrained acquisition of stations across the country. The Commission readily and properly acknowledges in the NPRM that localism "remains an important attribute of the broadcast media industry,"[104] but seeks comment with respect to the meaning of localism. The proper definition of localism, as used by Professors Schwartz and Vincent – the orientation of broadcasters towards serving the needs and desires of their local communities – reflects the longstanding approach Congress and the Commission have taken with respect to this core communications policy.[105] Indeed, the roots of localism pre-date the inception of broadcasting and have long been reflected in fundamental policy choices made by Congress and the Commission. It is these roots and policy choices that illustrate the meaning of localism and the importance to the public of preserving this quality in the American broadcast system.

The American system of broadcasting, like the American system of government, is premised on the concept that in a large country with strong centripetal forces, control over

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[104] *NPRM* ¶ 71.

[105] *See* Schwartz & Vincent, at 3.

material decisions should be as decentralized as possible.[106] In the allocation of political control, the framers of the U.S. Constitution tried to temper a powerful central government with the preservation of power in local communities aggregated in the states. In the licensing of broadcast media, the Congress and the Commission tried to balance the aggregation of power in New York and Hollywood with the preservation of broadcast outlets in smaller cities and rural areas across the country. The American system of broadcasting has at its core the objective of local control over program material to promote responsiveness to diverse community needs and tastes.

> [L]ocal service . . . is necessary if the public is to receive the maximum benefits from the television medium. [Without such service, there would be] no local news or weather reports, no outlet for local advertisers, no forum for the discussion of local problems, no television medium for the promotion of local, civic, charitable or other community programs or for cooperation with local law enforcement and other public officials, no adequate opportunity for local talent, no programming directed to special local tastes – in fact, none of the locally centered activities which make it important that a community have its own station rather than simply a satellite interconnected with the owned and operated stations of the three networks in New York City and Hollywood.[107]

Congress's desire to orient broadcast service toward local communities is manifested in section 307 of the Communications Act of 1934. Moving "under the spur of a

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[106] The Commission has recognized that the availability of local programming is important "to the functioning of our democratic institutions." *In re Cable Television Syndicated Programming Exclusivity Rules; Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television*, Report and Order, 79 FCC 2d 663, 673 (1980) ("Since the true value of local news and public affairs programming may not be reflected in the number of individuals who view it or the value they place one it but rather in the value it has to our society as a whole and especially to the functioning of our democratic institutions, it may be regarded as an 'externality' that needs to be accounted for in regulations since this extra or external value may not be completely accounted for by ordinary market institutions.").

[107] *Licensing of Community Antenna Television Systems*, S.R. Rep. No. 86-923, at 7 (1959).

widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field,"[108] Congress directed the Commission to "make distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." [109]

Localism is the driving force behind the television Table of Allotments. Stations are dispersed among various communities on the principle that local stations are better able to respond to local needs, and are more likely to reflect local tastes, than would stations centered outside of the locality.[110] The Commission announced in 1952 when it created the Table that dispersed allotments "protect[ ] the interests of the public residing in smaller cities and rural areas more adequately than any other system."[111] It rejected the construction of more powerful regional stations so that "as many communities as possible [would] have the advantages that derive from having local outlets that will be responsive to local needs."[112]

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108 *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 137 (1940).

109 47 U.S.C. § 307(b).

110 *See*, *e.g.*, *NBC v. United States*, 319 U.S. 190, 203 (1943) ("Local program service is a vital part of community life. A station should be ready, able, and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest.") (quoting a Commission decision); David N. Tobenkin, *The FCC's Main Studio Rule: Achieving Little for Localism at a Great Cost to Broadcasters*, 53 Fed. Comm. L. J. 469, 474-76 (2001).

111 Sixth Report and Order, 17 Fed. Reg. 3905 (1952).

112 *Id.*; *see also Report and Statement of Policy Re: Commission* en banc *Programming Inquiry*, 44 FCC 2303, 2316 (1960) (obligating each licensee to engage in "a diligent, positive, and continuing effort . . . to discover and fulfill the tastes, needs, and desires of his community or service area") (herein "*1960 Programming Report*").

Some 1,700 television stations are dispersed throughout 210 local markets. This dispersion is not technically required, nor does it result in the most efficient use of the spectrum. It would be much more efficient to have fewer stations that operate at higher power levels or with more translators or repeaters to relay powerful national or regional signals, in the mold of the European and Japanese broadcast systems. The structure of the U.S. broadcast system results from a desire for decentralized control and the dissemination of views from diverse sources.[113] And that is what makes it uniquely valuable.

As with federalism, different mechanisms (*e.g.*, local content benchmarks, restrictions on network control) have been used to achieve localism depending on current policy fashions and views of the law. The Commission has imposed, and the courts have upheld, a variety of policies to protect "the ability of the licensee to render the best practicable service to the community reached by his broadcasts."[114] Historically, the Commission's policies have taken three principal forms: (1) preserving the ability of local stations to meet local community needs, (2) enhancing the incentive of local stations to meet local community needs, and (3) actually requiring local stations to meet local community needs.

In the earliest days of television, the Commission adopted, and the courts upheld, policies to ensure that local stations retained the autonomy to respond to local needs, such as by prohibiting networks from requiring a station to preempt local programming.[115] Having

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113 *See, e.g.*, *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 808 (1978) (affirming the Commission's authority to consider local ownership in licensing decisions).

114 *FCC v. Saunders Bros. Radio Station*, 309 U.S. 470, 475 (1940); *see also NBC v. United States*, 319 U.S. 190 (1943).

115 *See NBC*, 319 U.S. at 205-206; *see* 47 C.F.R. § 73.658(e).

safeguarded the *ability* of local stations to reflect local tastes and satisfy local requirements for information, other policies were designed to enhance the *incentives* of owners to so reflect and satisfy local needs. These policies included establishing limits on the ownership of local stations[116] and providing for non-duplication protection for locally received network programming.[117]

Later, in the 1960s and 1970s, the Commission adopted policies to make sure that stations actually provided services tailored to the local community. Thus, the Commission identified elements that were necessary to serve the local community, including providing opportunities for local self-expression, developing and using local talent, providing local news programs and editorials, prohibiting excessive commercialization, and serving minority groups.[118] The Commission also required stations to ascertain the needs of the local community and then to meet those needs.[119] When the Commission repealed these formal requirements, it emphasized that it expected television stations to continue to reach out to familiarize themselves with the concerns of the communities they serve and be responsive to them in their program service.[120] Thus, the Commission continues to require stations to compile and place in their local

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116 47 C.F.R. § 73.3555(c)(2).

117 47 C.F.R. §§ 76.92-76.95.

118 *See 1960 Programming Report*, at 2314; *see also Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (stressing the importance Congress attributed to supporting local broadcasting in affirming must-carry laws); *Simmons v. FCC*, 169 F.2d 670 (D.C. Cir. 1948) (valuing local program over network programming).

119 *See 1960 Programming Report*, at 2316-2317; *see also In re Ascertainment of Community Problems by Broadcast Applicants*, 57 FCC 2d 418 (1975).

120 *See The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, Report and (continued…)

public files on a quarterly basis a narrative description of the issues of community concern and their programs that provided the most significant treatment.[121]

Neither the Commission nor Congress has lessened its commitment towards a system of local stations that are focused on providing differentiated service to their communities of license. Unchanged is the legislative and administrative objective, reflected in the physical structure of the broadcast system, that local stations program for local tastes and needs. As Congress explained when considering the 1996 Act: "Localism is an expensive value. We believe it is a vitally important value, however, and . . . it is a principle of communications policy rooted in the Communications Act of 1934. It should be preserved and enhanced as we reform our laws for the next century."[122] The Commission upheld that commitment to localism in its construction of the DTV Table of Allotments, which continues the policy of overlapping and geographically dispersed station signals.[123] But for the Commission's strong interest in promoting localism, it almost certainly would have moved towards a more centralized and

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(footnote cont'd)

Order, 98 FCC 2d 1076, 1101 (1984) (repealing ascertainment requirements because market forces were sufficient to ensure that a licensee "stay[s] informed about the needs and interests of its community" and in light of "the continuing obligation of all licensees to provide issue-responsive programming").

121 47 C.F.R. § 73.3526(11)(i).

122 H. Rep. No. 104-204, at 221 (1995); *see also* S. Rep. No. 104-23, at 69 (1995) (additional views of Sen. Hollings) ("Any modification in the national ownership cap is important because of localism concerns. Local television stations provide vitally important services in our communities.").

123 *See* 47 C.F.R. § 622(b).

spectrum-efficient model of television broadcasting in which a handful of stations affiliated with each network in each region of the country would provide service to those regions.

E. The National Television Ownership Rule Furthers Competition

In the *1998 Biennial Review*, the Commission concluded that raising or eliminating the 35 percent cap would "increase concentration in the national advertising market, and enlarge the potential for monopsony power in the program production market."[124] In remanding for additional consideration of the rule, the court's opinion in *Fox Television* noted that there is "a plausible argument that the [national television ownership rule] indeed furthers competition in the national television advertising market."[125] NAB and NASA here address "the impact this rule may have on the program production market and the advertising market."[126] In addition, NAB and NASA discuss a third way in which the national ownership rule furthers competition: by holding open the possibility that strong local stations will shift their network affiliation to an emerging network, thus removing a barrier to the emergence of strong broadcast networks that would exist if networks owned all or most of their affiliates.

NAB and NASA believe that the Commission should continue to regard competition as a relevant and important policy goal to be furthered by the national TV ownership rule. The Commission has adhered to this position for decades, and the courts have endorsed the Commission's view that it is authorized (and obligated) to consider competition within the communications industry, and is not narrowly limited to regulating activities that are illegal

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124 *1998 Biennial Review*, at 11073 n.78.

125 *Fox Television*, 280 F.3d at 1049.

126 *NPRM* ¶ 138.

under the antitrust laws.[127] Section 202(h) is entirely consistent with this longstanding policy, because it expressly refers to "competition," and implicitly recognizes that rules may be needed to promote competition.

There are several reasons why the Commission should continue to take competitive considerations into account in connection with the 35 percent cap, rather than simply relying on the Department of Justice to enforce the antitrust laws. *First*, the Commission is able to take a long-term, comprehensive view of the industry, while the antitrust agencies typically focus on a particular transaction. *Second*, the Commission may choose to go beyond the antitrust agencies in protecting competition. For example, the Department of Justice might permit one or more networks to continue acquiring stations until it concludes that the next acquisition is likely to cause a competitive problem. This could result in a situation in which one network (the "first mover") owns many more of its stations than others. In contrast, the Commission is able to adopt a national ownership rule that preserves competitive balance among networks by placing them all on an equal footing. *Third*, the Commission distributes licenses based on a finding that granting the license serves the "public interest, convenience and necessity" and reviews these licenses every eight years. It is perfectly appropriate, and indeed obligatory, for the Commission to take into account the positive or negative consequences of its licensing decisions in terms of competition and in other respects, such as localism, as well.

To ensure the Commission does not overlook the relationship between the national TV ownership rule and the convergence of major networks, these comments discuss that

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127 *See, e.g.*, *United States v. RCA*, 358 U.S. 334, 351 (1959); *NBC v. United States*, 319 U.S. 190, 223-24 (1943); *United States v. FCC*, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (en banc).

consideration first. The comments then describe how the rule promotes competition in national advertising and program production.

1. The National TV Ownership Rule Promotes The Emergence Of Strong Networks

The national TV ownership cap promotes competition by reducing barriers to the emergence of strong national broadcasting networks. It is undisputed that the television broadcasting industry is dominated by the four major networks.[128] The high degree of concentration reflects significant barriers to entry that inhibit the ability of other networks to grow and compete. The barriers to new robust networks come in the form of "mobility barriers." These are "barriers to entry that deter the movement of a firm within a given industry" and the lack of threat of entry means the networks "will have greater profit potential."[129] As the Commission recognized just two years ago:

> The major mobility barrier impeding entry into the majority network strategic group is the availability of affiliated stations. Notwithstanding some growth in the number of stations over the last decade, obtaining sufficient affiliated stations remains a major obstacle to developing a new broadcast network that can achieve sufficient national reach to be attractive to national advertisers seeking to reach a mass audience.[130]

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128 *See infra* note 160 (discussing economic concentration of the big four networks).

129 *In the Matter of Amendment of Section 73.658(G) of the Commission's Rules – The Dual Network Rule*, 16 FCC Rcd 11114, 11123 n.47 (2001) (herein "*Dual Network Order*"). *See generally* Richard J. Gilbert, *Mobility Barriers and the Value of Incumbency* in 1 THE HANDBOOK OF INDUSTRIAL ORGANIZATION 491 (Richard Schmalensee & Robert D. Willig, eds.) (1989); R. E. Caves & M. E. Porter, *From Entry Barriers to Mobility Barriers: Conjectural Decisions and Contrived Deterrence to New Competition*, 91 Q.J. Econ. 241 (1977).

130 *Dual Network Order*, at 11123.

Repeal of the national TV ownership cap would increase mobility barriers. Under the current rule, affiliates retain the option of switching to a competing network, a fledgling network, or a brand-new network, when their affiliation agreement expires. The possibility of such switches imposes a competitive constraint on the networks. If the network is not competitive, it risks losing not only audience share, but also affiliates. (Incidentally, this threat may also exercise some restraint over networks' decisions to carry programs that they themselves have produced as opposed to higher-quality programs purchased from independent producers.) In contrast, ABC, CBS, NBC, and Fox can exercise absolute veto over network shifts by their O&Os. Because the strongest local stations tend to affiliate with the strongest networks, repeal of the national television ownership cap would allow the existing networks to "lock up" all the strongest local stations, thus barring the path for a strong new network to emerge.

The Fox Network's ability to attract a number of prime affiliates from the existing major networks was a key element of its emergence as the fourth major network. If ABC, CBS, and NBC had owned all or most of their affiliates, it is doubtful that Fox could have grown from a specialized network (similar to the WB or UPN) into the mass-media network it has become.

In sum, competition is promoted by retaining the ownership cap, as the cap increases station mobility to permit the creation of new networks or the emergence of stronger networks from the ranks of current fledgling networks. If the networks were permitted to secure all important distribution channels by purchasing controlling interests in their affiliates, existing mobility barriers would be heightened. If a new or fledgling network is foreclosed from affiliating with a strong station, it may be consigned to "minor network" status, with no real opportunity to become a major network on a par with NBC, ABC, CBS, and Fox. This is not in the public interest.

2. The National TV Ownership Rule Furthers Competition In National Advertising

In reviewing the national TV ownership rule, it is appropriate for the Commission to consider competition in advertising markets. Advertising conveys useful information to viewers, and this flow of information may be impeded if advertising markets are not fully competitive. Moreover, if advertising markets are less than fully competitive, networks and local stations will have diminished incentives to present the best possible programs to attract viewers (and thereby attract advertisers).

The Commission has long viewed national television advertising as a relevant market, based on the distinction between advertisers seeking a national audience and advertisers seeking a local audience.[131] Moreover, the Commission has recognized that the four major networks (ABC, NBC, CBS, and Fox) are a "strategic group" among the broadcast networks.[132] These four major networks sell national network ads. But national *spot* ads offered by individual stations provide the opportunity for national or broad regional coverage by combining dozens or even hundreds of local advertisement spots from different local television stations, including network affiliates. The combination of local stations' advertising spots is accomplished by using

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131 *NPRM* ¶ 142; *Amendment of Sections 73.35, 73.240, and 76.636 of the Commission's Rule Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations*, 95 FCC 2d 360, 386 (1983).

132 *NPRM* ¶ 142; *Dual Network Order*, at 1122-23. As the Commission has noted, "the concept of a strategic group ordinarily implies" that "competitive rivalry will be oligopolistic in nature." *NPRM* ¶ 142 n.227.

a national stations representative. The national spot and network advertisements are aired in the same medium and can be tailored to capture the same demographics.

The national network and spot advertisement industry is massive. In 2001, national spot volume exceeded $9 billion, amounting to 35 percent of the $26 billion national television broadcasting advertisement market.

TABLE 4

National Broadcast Television Advertising Market

Year	Total Television Broadcasting National Advertising[133]	Network	National Spot	Syndication
1975	$3,929	$2,306	$1,623	$0
1980	$8,449	$5,130	$3,269	$50
1985	$14,584	$8,060	$6,004	$520
1990	$18,860	$9,963	$7,788	$1,109
1991	$17,896	$9,533	$7,110	$1,253
1992	$19,170	$10,249	$7,551	$1,370
1993	$19,585	$10,209	$7,800	$1,576
1994	$21,669	$10,942	$8,993	$1,734
1995	$22,735	$11,600	$9,119	$2,016
1996	$25,102	$13,081	$9,803	$2,218
1997	$25,457	$13,020	$9,999	$2,438
1998	$27,004	$13,736	$10,659	$2,609
1999	$27,331	$13,961	$10,500	$2,870
2000	$31,260	$15,888	$12,264	$3,108
2001	$26,631	$14,300	$9,223	$3,108

Source: Jonathan Levy et al., *Broadcast Television Survivor in a Sea of Competition*, Media Ownership Working Group Study at Table 4 (2002).

National spot advertisements offered by affiliates compete with national network advertisements offered by the networks. Although national spot advertisements tend to be

133 The figures in Table 4 are expressed in millions of current dollars.

somewhat more expensive than national network advertisements on a per-station basis, an advertiser may prefer the greater flexibility offered by the national spot advertisements, which can be tailored to cover vast regions without requiring the advertiser to purchase time in every local market in the country. In addition, national network advertisements are sold further in advance, thus requiring a longer commitment on the part of the advertisers. National spot advertisements also provide an important alternative when the demand for national advertising on a particular network program exceeds the available supply of national network spots. When purchased on a national basis, the two kinds of advertisements can be largely identical. So long as there are enough independent affiliates to piece together an unwired network, national spot advertisements provide advertisers a competitive alternative to purchasing the national network ads from the four major networks.

A detailed economic study by Commission economists provides evidence that advertisers view network and spot advertisements as good substitutes.[134] McCullough and Waldon published an article in the *Quarterly Journal of Business & Economics*, a peer reviewed economics journal, that tested empirically the hypothesis that network and national spot television advertisements are substitutes. Using data from 1960 through 1994, the authors tested the relationship between the price for national network and spot advertisements. The authors concluded that the estimated elasticities "suggest that the network and national spot advertisements have been, and continue to be, good substitutes in the aggregate."[135]

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[134] *See* B.D. McCullough & Tracy Waldon, *The Substitutability of Network and National Spot Television Advertising*, 37 Q.J. Bus. & Econ. 3 (Spring 1998).

[135] *Id.* at 13. Another empirical study was undertaken by Silk, Klein, and Berndt to determine if network and spot advertisements were substitutes. *See* Alvin J. Silk, Lisa R. Klein, (continued…)

Abandoning the ownership cap would jeopardize the ability of independent affiliates to continue to offer national spot advertisements in competition with the networks. *First*, if the networks were permitted to own all or most of their stations, they would not compete against themselves for the sale of national advertising. *Second*, even modest increases in network ownership will threaten the ability of the remaining local broadcast stations to offer broad coverage through national spot advertisements. To offer a competitive alternative to network ads, there must be enough affiliates in key markets to piece together a national "unwired network." These affiliates would disappear if the Commission were to abandon the national TV ownership cap, allowing the networks to extend their ownership of top broadcasting stations into most or all major broadcasting markets. Losing access to a sufficient number of key broadcasting markets would make it impossible for advertisers to put together national or regional "buys" based on local-station national spots, and thereby could erode or destroy a $9 billion competitive alternative to national network advertisements.

The loss of national spot advertisements would not only harm advertisers, but it would also jeopardize the economic survival of smaller affiliates of the big four networks, affiliates of fledgling networks, and independent broadcast stations, all of which participate in the national spot marketplace. On average, national spot advertisements account for roughly 40

(footnote cont'd)

and Ernst R. Berndt, *Intermedia Substitutability and Market Demand by National Advertisers*, 20 Rev. Ind. Organization 323 (2002). Although the signs for the cross elasticities for network and spot television shows were negative, implying complements, the authors caution that "[t]his would appear to be an anomalous result in light of the evidence … that these two media are substitutes." *Id.* at 339 n.16.

percent of the revenues of major-network affiliates.[136] Without this revenue stream, affiliates would be hard pressed to make ends meet, let alone to maintain current expenditures on local news, public affairs, and other programming of local interest.

3. The National TV Ownership Rule Furthers Competition In The Program Production Market

The national TV ownership rule also promotes competition in program production. This is so in two respects. *First*, independently-owned affiliates are far more likely to balk at the networks' choosing for network presentation their own programs over higher-quality programs developed by independent producers. *Second*, independent producers compete for non-network time slots in local stations' schedules with network re-runs. If the networks owned more local stations, independent affiliates would no longer create opportunities in this market for independent producers.

As previously discussed, with the repeal of the fin/syn rules, the networks have acquired major program producers (or developed their own) and have obtained financial interests in, and syndication rights for, the programs they present during "network time slots" and then syndicate for re-runs during non-network time slots.[137]

Permitting the networks to extend their control of the distribution channels critical for the success of new mass-media programming would allow them to further tighten their grip on the programming industry. For the few remaining independent program producers to have any prospect of survival, they need distribution outlets for their new programming. Despite the

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[136] *See* Table 4 *supra*.

[137] *See supra* notes 70-75 and accompanying text.

growth of cable television, broadcast television remains the only mass-distribution venue that supports mass-media programs of the kind aired by NBC, CBS, ABC, and increasingly by Fox.[138] The national TV ownership cap prohibits the major networks from cutting off the air supply to these competing program producers. Already, the networks own 100 percent of their affiliates in the four largest distribution outlets – New York, Chicago, Los Angeles, and Philadelphia. The loss of access to even a small portion of the remaining top markets may sound the death knell for the remaining independent producers developing programming for mass viewers. Denied access to a sufficiently large audience to support mass-media programming, these producers will have to shift focus to developing specialized programming for the smaller cable networks or go out of business.

This would result in a loss of existing competition faced by networks and increase the leverage networks have over affiliates, making it more difficult for affiliates to make independent decisions on programs. As the independent network programming market shrinks, the penalty for a station that loses its affiliation becomes even more severe. And it would become even more difficult for a new broadcasting network to emerge, as it would have fewer sources for mass-media programming. If the networks are permitted to acquire even more affiliates, the Commission (along with the rest of the country) may well witness the extinction of independent program producers targeting mass viewers.

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138 *See infra* notes 160-64 and accompanying text.

4. The Growth of Cable, DBS, DTV And New TV Networks Does Not Eliminate The Need For A National TV Ownership Rule

The networks contend that the national TV ownership rule is no longer necessary as a result of the growth of alternative distribution channels, such as cable and DBS, and the growth of new broadcast networks such as Fox, UPN, WB, and Pax. NASA and NAB disagree for several reasons.

First, broadcast television remains the sole source of television programming for large numbers of Americans.[139] It remains the only source of *free* news and local programming for all viewers.

Second, one of the benefits of the national TV ownership rule is that it promotes the creation of new broadcasting networks, like Fox, WB, UPN, and Pax. It would be illogical for the Commission to conclude that, due to the success of the cap in lowering mobility barriers and fostering competition, the Commission should now abandon that constraint. Once the Commission makes that decision, the major television networks will be able to acquire their independent affiliates, and growth of new and fledgling networks will be impeded.

Third, the fragmentation of the radio, newspaper, and cable markets makes the national TV ownership rule *more* important, not less. Recently, the Commission reconfirmed that the major networks are a distinct strategic group, due in part to the growth of alternative media.

> At present, the network firms comprising this strategic group [ABC, CBS, NBC, and Fox] provide the greatest reach of any medium of mass communications. *Since delivering a mass*

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139 As of June 2002, over 15 million TV households were without cable or DBS. *See Ninth Annual Report*, MB Docket No. 02-145, app. B at Table B-1 (rel. Dec. 31, 2002).

> *audience is becoming more difficult for all media with the proliferation of media outlets, media that can still produce mass audiences have become more valuable*. As a result, notwithstanding some recent erosion in revenue growth, broadcast networks have achieved substantial gains in revenues in recent years despite their loss of audience relative to years past.[140]

The power of the networks reflects the unique aspects of broadcast television. No other medium is received *for free* by mass audiences. Mass broadcasting assumes even greater importance as a result of the splintering effect from the introduction of cable and DBS and the emergence of other video media. It therefore remains in the public interest to ensure that this highly concentrated industry remains competitive and to curb the ability of networks to encroach on the ability of independent broadcast television stations to exercise control over local programming content.

F. The Views Expressed In The Commission's 1984 *Report* Are Incomplete, Incorrect, And Do Not Reflect Current Conditions

The Commission seeks comments on its *1984 Multiple Ownership Report and Order*, which conflicts with the *1998 Biennial Report.*[141] In particular, the Commission concluded in its *1998 Biennial Report* that "independent affiliates play a valuable role by 'counterbalancing' the networks' strong economic incentive in clearing all network programming 'because they have the right . . . to air instead programming more responsive to local concerns."[142] In *Fox Television*, the court held that this finding is "a plausible justification

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140 *Dual Network Order*, at 11123 (emphasis added).

141 *NPRM* ¶¶ 135-37; *1984 Multiple Ownership Order and Order*, 100 FCC 2d 17, 24 (1984) (herein "*1984 Report*").

142 *NPRM* ¶ 134 (quoting *1998 Biennial Report*, at 11075).

for the national ownership rule and consistent with the requirements in section 202(h)."[143] The court remanded to the Commission, however, to "address itself to the contrary views it expressed in the *1984 Report*,[144] which it admitted might be inaccurate or superceded by intervening developments. The Commission's conclusion to this effect in its *1998 Report* is correct. The *1984 Report* failed to consider the importance of the national TV ownership rule in furthering localism, and in other respects its conclusions were incorrect in 1984 or have been overtaken by events since that time. It is therefore not surprising that the *1984 Report* was repudiated by Congress and that, ultimately, the Commission declined to follow its recommendations.

1. The *1984 Report* Failed To Consider Localism

The single most significant shortcoming of the *1984 Report* is its failure to consider localism, and the ways in which the national TV ownership rule advances localism. Indeed, the *1984 Report* did not even mention the Commission's localism policy.[145] Consequently, it is not surprising that the *1984 Report* failed to consider facts and arguments that strongly support the Commission's conclusion in its *1998 Report.*[146]

In particular, the *1984 Report* failed to consider the argument that affiliates have an incentive to air the programs of the greatest value to their local viewers, while O&Os have an incentive to clear all network programming, even if a non-network program is of greater value to

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143 *Fox Television*, 280 F.3d at 1043.

144 *Id.*

145 *See 1984 Report*, at 24.

146 The *1984 Report* also devotes most of its attention to comparing group-owned and non-group-owned stations. Although the *1984 Report* included a short section entitled "The Special Case of the Three TV Networks," that section fails to consider many of the key arguments and facts discussed in these comments.

local viewers. As explained in Part I.B-C, developments since 1984 have increased the incentives of O&Os to air network programming even at the expense of local community interests. In 1984, O&Os had an incentive to air network programming to maximize national advertising revenue. Today, as a result of the repeal of the fin/syn rules, O&Os have an added incentive to air all network programming, because an increase in ratings has the effect of increasing the syndication value and foreign sale of the network's programs. Because of the trend toward "repurposing" network content or other media controlled by the networks, this incentive has been further enhanced. Moreover, networks have a natural tendency to favor their own programs. This makes it even more important that local stations have the ability to preempt network programming.

2. The *1984 Report*'s Findings Concerning Local News And Public Affairs Do Not Reflect The Current Situation

The *1984 Report* relied on data suggesting that group-owned stations in general, and network-owned stations in particular, offer more hours of local news programming, achieved significantly higher ratings on their news programming, and won numerous awards. As discussed in Part I.C.5, current data indicate that there is *no* statistically significant relationship between network ownership and the ratings of local news programs or the number of hours of local news shown each week, and that affiliates offer *higher* quality local news programming, measured by the number of major awards per station in similar-sized markets. Thus, current data suggest that affiliates do a somewhat better job than O&Os at presenting local news.

3. The *1984 Report* Placed Too Little Weight On Interactions Among Local Markets

The *1984 Report* concluded that "a national rule is irrelevant to the number of diverse viewpoints in any particular community."[147] This conclusion was based on the presumption that "viewers in San Francisco, St. Louis and Philadelphia each judge viewpoint diversity by the extent of sources of ideas available to them, not by whether those same or other ideas are available in other broadcast markets."[148] As explained above, however, a viewer in one local market may read a review of a program aired in another market, hear the program being discussed, or learn of an investigative news story or special report undertaken by an affiliate in another city.[149] Because O&Os have an incentive to broadcast a uniform network schedule, this type of cross-fertilization is less likely to occur in the absence of the national TV ownership rule.

The *1984 Report* recognized "that ideas can migrate from one local market to another."[150] The *Report* dismissed this consideration, however, and offered three reasons for doing so. *First*, "the record demonstrates that group owners do not impose monolithic viewpoints on local media outlets." *Second*, "there is such an abundance of idea sources" when radio stations, newspapers, and magazines are considered that the effect of eliminating the cap will be "at worst inconsequential." *Third*, group ownership "likely has offsetting advantages in

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147 *1984 Report*, at 25.

148 *Id*. at 27.

149 *See supra* pp. 11-12. This is the strength of federalism where individual states can serve as laboratories for testing out new ideas that may ultimately be adopted by other states or the national government.

150 *1984 Report*, at 37.

enriching the variety of information available in the local community."[151] The *1984 Report* addressed only "ideas" in the abstract; it failed to address diversity in television programming. As shown above, networks have an incentive to impose uniform programming on affiliates unlike non-network group owners, and thus O&Os are less likely to consider non-network programs and their innovative program offerings. Newspapers and magazines may be excellent sources of abstract ideas, but they do not provide additional sources of television programming and other innovative program offerings. Finally, there is no evidence that network ownership enriches the variety of information available to the local community.

4. The *1984 Report* Overlooked Important Competitive Issues

In considering the effect of the national TV ownership rule on advertising markets, the *1984 Report* discussed local spot advertising and network advertising, but failed to consider national spot advertising. As explained in Part I.E.2, the availability of national spot advertising constrains network advertising rates. If networks owned all their affiliated stations, they would not compete with themselves for national advertising. Accordingly, an existing constraint on national advertising rates would be removed.

In addition, the *1984 Report* was written while the fin/syn rules remained in effect, and thus had no occasion to consider the effect of repealing those rules. As noted above, there has been a drastic and rapid consolidation of the number of programmers, and a high percentage of the remaining programmers are owned or controlled by a network. Networks will have a natural tendency to favor their own programs; the national TV ownership rule ensures that many network affiliates will be capable of preempting network programming if other

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151 *Id.* at 38.

programming would better serve the community's needs and of carrying programming from non-network sources during non-network slots in their schedules in preference over network syndicated material. In contrast, O&Os cannot be expected to preempt the network's own programs.

Similarly, the *1984 Report* was written while the networks were bound by the Seven Station rule, and thus had no chance to consider the effect of relaxing that rule, first to 25 percent and then to 35 percent. In 1984, no network could own more than seven broadcasting stations; now Viacom owns 39 stations, Fox owns 37 stations, and General Electric owns 26 stations.[152] These changes to the rule have provided a natural laboratory to analyze the consequences of abandoning the media ownership cap. The evidence shows that the *1984 Report* was flawed, both because it failed at the time to consider localism and because recent events demonstrate that the media ownership cap remains in the public interest.

II. THE DUAL NETWORK RULE CONTINUES TO SERVE THE PUBLIC INTEREST

In the NPRM, the Commission seeks comments on whether the "dual network" rule[153] continues to serve the interests of competition, diversity, and localism, by preventing common ownership among two or more of the major networks: ABC, CBS, NBC, and Fox. The Commission recently undertook an exhaustive analysis of the dual network rule and decided to modify the rule in light of UPN's precarious financial position and the merger of Viacom and

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152 *See supra* note 57 and accompanying text.

153 47 C.F.R. § 73.658(g).

CBS.[154] In that earlier proceeding, NASA took no position on the proposal (which the Commission then adopted) to repeal the portion of the rule that prohibits common ownership of one of the big four networks and the WB, UPN, or other fledgling network. In these comments NASA renews its objection to repealing the rule in its entirety. (NAB takes no position on whether the Commission should retain the current version of the dual network rule.) The evidence and findings the Commission developed just a few years ago in connection with the prior proceeding provide ample evidence that retaining the dual network rule remains in the public interest.

A. The Dual Network Rule Was Intended To Remove Entry Barriers That Would Inhibit The Development Of New Networks And Thus Promotes Competition, Diversity, And Localism

In adopting the dual network rule, the Commission expressed concern that permitting an entity to operate more than one network "might preclude new networks from developing and affiliating with desirable stations because those stations might already be tied up by the more powerful network entity."[155] A central policy goal of the rule was to assure viewpoint diversity and foster competition among national program providers. As the *Dual Network Notice* stated, "[t]he dual network prohibition, therefore, was intended to remove barriers that would inhibit the development of new networks, as well [as] to serve the Commission's more general diversity and competition goals."[156]

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[154] *See Dual Network Order*.

[155] *In the Matter of Amendment of Section 73.658(g) of Commission's Rules – The Dual Network Rule*, 15 FCC Rcd 11253 (2000) (herein "*Dual Network Notice*").

[156] *Dual Network Notice,* at 11254.

Those barriers to entry still exist. The Commission has correctly noted that significant mobility barriers impede entry by a new major network and that the inability of potential competitors to obtain sufficient affiliates to develop a competing broadcasting network means greater profit potential for the networks. As the Commission recently recognized, the major mobility barrier impeding entry of a new powerful network is the availability of affiliated stations. "Notwithstanding some growth in the number of stations over the last decade, obtaining sufficient affiliated stations remains a major obstacle to developing a new broadcast network that can achieve sufficient national reach to be attractive to national advertisers seeking to reach a mass audience."[157] Mobility barriers are "barriers to entry that deter the movement of a firm within a given industry" and, like all barriers to entry, the lack of threat of entry means the networks "will have greater profit potential."[158] Viacom has acknowledged that to compete with the major networks, a fledgling network must establish a relationship with scarce local stations in key markets.[159]

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157 *Dual Network Order*, at 11123.

158 *Id.* at 11123 n.47.

159 In its prior comments on the dual network rule, Viacom acknowledged that the inability to enter into relationships with key stations hurt UPN's ability to compete with the bigger networks. "[B]ecause the four established networks had long since entered into relationships with the stations having the most desirable transmission facilities – VHF stations and well-located UHF facilities – UPN had to fight with the other new network, WB, for whatever other outlets might be left in each local market. Thus, UPN was forced to cobble together a national network of affiliates composed largely of UHF stations and, in a number of markets, of LPTV facilities, most of which are at a substantial coverage disadvantage vis-a-vis competing stations affiliated with the established 'Big Four' networks. In a few markets, UPN was not able to secure an over-the-air affiliate at all, and instead endeavored to arrange for fill-in cable carriage." Comments on the *Dual Network Notice* by Viacom, p. 22 (filed Sept. 1, 2000).

Audience fragmentation has not diminished the market power of the broadcast networks. Despite the emergence of new media, the big four broadcast networks still have, by far, the largest concentration of viewers and television economic power.[160] As the Commission has previously stated, "[n]o single cable channel today provides the audience reach of any television network. Only broadcast network television provides a *mass distribution* venue for programming and advertising, notwithstanding the continuing erosion of network television audience attributable to the growth of cable and DBS viewership."[161] For example, each of the top 25 prime-time broadcast programs during the week of December 9-15, 2002 (all of which were aired by CBS, ABC, NBC, or Fox) achieved considerably higher HH ratings than any of the 25 most popular cable programs.[162] The highest-ranked broadcast program (CBS's *CSI*) had a rating larger than the top five cable programs' ratings combined.[163] Even the HH rating of the 25th-ranked broadcast program (ABC's *NYPD Blue*) was more than three points higher than the

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160 The economic concentration of the big four networks as measured by the Herfindahl-Hirschman Index ("HHI") currently exceeds 2600 – a measurement indicating a "highly concentrated" market. *See Dual Network Notice*, at 11263 n.31. Moreover, the Commission staff has determined that any merger between or among the big four networks would exceed 100 points, suggesting that such a merger would enhance market power or facilitate the exercise of market power. *See id.* at 11 n.31. These figures demonstrate that the networks continue to have market power unmatched by any other segment of the television industry.

161 *Dual Network Notice*, at 11257 (emphasis in original).

162 *See* Television Bureau of Advertising, Inc., Viewer Track, *Top 25 Programs on Broadcast and Cable: Week Ending Dec. 15, 2002*, *at* http://www.tvb.org/rcentral/index.html (last visited Jan. 1, 2003).

163 *Id. See also* notes 34-35 and accompanying text (observing that 99 of the 100 top-rated prime-time programs are broadcast programs and that the combined average viewership for the four major broadcast networks is almost six times as high as that of the top ten ad-supported cable networks).

top cable program (ESPN's *NFL Regular Season*) and nearly three *times* higher than the second-ranked cable program (ESPN's *Junction Boys - Premiere*).[164]

The market power of the television networks is further demonstrated by their continued ability to charge high advertising rates. As one economic study indicates, the forces of supply and demand work in favor of the broadcast networks.[165] As the ability to reach a large audience becomes more difficult for all media, television media that can still deliver a mass audience have become more valuable. This explains why, as discussed above, broadcasting's percentage share of advertising revenue continues to greatly exceed its percentage share of viewing.[166]

Nor has audience fragmentation diminished the leverage the networks have over their affiliates and may even have exacerbated it. Network affiliation remains critical for the economic survival of most local television stations. As several commenters in the prior *Dual Network Notice* proceeding stated, "[t]o operate as an independent today . . . would be impossible,"[167] and "[w]ithout a network affiliation, the attendant increases in programming and promotional expenses would be a very difficult economic proposition."[168] Similarly, one station,

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164 *See* Television Bureau of Advertising, Inc., Viewer Track, *Top 25 Programs on Broadcast and Cable: Week Ending Dec. 15, 2002*, *at* http://www.tvb.org/rcentral/index.html (last visited Jan. 1, 2003).

165 *See Dual Network Notice*, at 11262 n.26 (citing The Veronis, Suhler & Associates Communications Industry Forecast (13th ed., Nov. 1999)).

166 See *supra* p. 13 (noting that broadcasting's share of advertising revenue in 2001 was 71.5 percent whereas its audience share stood at 53.7 percent).

167 Comments on the *Dual Network Notice* by Lockwood Broadcast Group, at 1.

168 Comments on the *Dual Network Notice* by LIN Television Corp., at 1.

WNGS-TV, Buffalo, New York, informed the Commission that it "is a locally owned and operated station that would not be able to survive in a very crowded marketplace without the UPN affiliation."[169] To the extent the Commission amends the rule to allow greater concentration of ownership among networks, the imbalance of economic power between networks and their affiliates will be further exacerbated. While the networks have historically threatened to terminate or not renew a local station's network affiliation for preemption of national network programs in favor of programs of greater local interest, affiliates will have fewer program options and fewer alternative choices of program providers as the number of network owners decreases. If, for example, NBC and CBS were permitted to merge, a terminated CBS affiliate would no longer be able to turn to NBC for affiliation. Consequently, relaxation of the dual network rule will, indeed, increase the networks' economic leverage over affiliates.

B. Because Of The Mobility Barriers Protecting The Major Networks, The Dual Network Rule Serves The Public Interest By Promoting Competition, Diversity, And Localism

After extensive analysis of the broadcasting industry, the Commission concluded in 2000 that "Given our analysis of the potential effects of a merger of [the major] networks . . . , the dual network rule as applied to the four major networks should *not* be relaxed until the mobility barriers defending the major network strategic group are lowered."[170] NASA agrees. The Commission hypothesized that the deployment of digital television "may lower barriers to new broadcast networks by enabling broadcast stations to carry multiple program streams."

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169 Comments on the *Dual Network Notice* by WNGS-TV, at 1.

170 *Dual Network Notice*, at 11263 (emphasis by the Commission).

Perhaps, but until that day comes, there is no reason the Commission should permit common ownership of the major networks.

The public interest is best served by having *more* networks, not fewer. For over 60 years, the Commission has adopted a wide variety of rules with a common purpose: to curb the exercise of market power by the major networks. These rules served the public interest by promoting competition, diversity, and localism. By preserving the current level of consolidation, the dual network rule similarly serves all three of those goals.

The rule obviously preserves competition by prohibiting the merger of any two of the directly competing major networks. This is evidenced from the lips of a network itself: Viacom. In the prior dual network proceeding, Viacom argued that CBS did not really compete with UPN. Rather, Viacom candidly acknowledged that its principal competition came from the broad-based, traditional networks operated by NBC, CBS, and increasingly by Fox.[171] Viacom was correct. The list of CBS, NBC, and ABC programs that compete head-to-head for share of the same demographics is just too long to list, but includes shows like *NBC Evening News*, *CBS Evening News*, and *ABC Evening News*; *Late Show With David Letterman* and *The Tonight Show With Jay Leno*; *Friends* and *Survivor*; and *Today*, *The Early Show*, and *Good Morning America*. One could argue over whether the "public good" is better served by fewer network morning

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[171] "Because UPN's audience is drawn predominately from the demographic stratum of young, urban viewers, it competes most directly with WB, to a lesser extent with Fox, and with national cable networks that target this particular audience segment. By contrast, because the CBS network skews sharply towards older viewers, and a more general cross-section of the U.S. population, it competes directly with the broad-based, traditional networks operated by NBC and ABC." Comments on the *Dual Network Notice* by Viacom, at 22.

shows. But viewers should make that decision, not two major networks who jointly agree to stop competing.

Furthermore, despite the proliferation of new and different media outlets, the Commission must remain vigilant in promoting its longstanding diversity goals, with which common ownership of two major networks would be inconsistent. Broadcast television remains the only medium that provides a *free*, over-the-air, local video programming service to virtually all Americans. The need for Commission action to assure diversity and robust competition among free, over-the-air television broadcast networks has in no way been diminished by the growth of other media.

It is undisputed that repeal of the Commission's fin/syn rules has led to vertical integration by the networks. The networks now produce, to the near exclusion of all others, their own network-owned programs for network broadcast. The "network funnel" through which national television broadcast programming must pass will be reduced as the number of independently-owned networks is decreased. Independent programmers, for all practical purposes, are now shut out of the national broadcast network market and are greatly jeopardized in gaining access to non-network time slots given the dominance of the networks in the syndication market.

Abandoning the dual network rule would erode the bedrock principle of localism upon which the nation's television broadcast regulatory system is based.[172] Time and again, the Commission has recognized and supported this principle. There have been no economic,

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[172] *See supra* Part I.D (discussing Congress's and the Commission's commitment to localism).

societal, or technological changes that have in any way weakened the vitality of or the need for localism. Indeed, escalating consolidation among the national network companies and increasing vertical integration calls for more, not less, Commission vigilance in ensuring regulatory oversight of the national broadcast television networks.

C. Abandoning The Dual Network Rule Offers No Substantial Economic Benefits To Counterbalance The Loss Of Competition, Diversity, And Localism

Competition, diversity, and localism are best served by the presence of more, rather than fewer, major networks. We are aware of no evidence that justifies abandoning the rule.

In the prior rulemaking proceeding, the Commission relaxed the dual network rule for two reasons. First, UPN was failing. The network was losing money steadily, in part because all the best local stations were under contract with the major networks. Thus, saving UPN by permitting the common control of CBS and UPN arguably served the public interest. It preserved a broadcasting network that was in competition with WB, Pax, and various cable networks. The decision also promoted diversity by retaining another voice in the broadcasting market, even if Viacom would control that voice. Second, the Commission concluded that UPN would significantly benefit from a merger with CBS, permitting the merged entity to reduce the risks associated with program development by broadening its broadcast base.

No similar reason exists to permit, for example, Viacom to purchase NBC.[173] Both are already massive networks with a broadcast and related-business base adequate to spread

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[173] Viacom would then own not only CBS and UPN but also NBC and its additional interests in Telemundo, Paxson, Bravo, and other national video distribution vehicles controlled by NBC or its parent company General Electric.

the risk of developing new programs. Both are already vertically integrated. And neither is in any risk of disappearing from the broadcasting landscape, as UPN arguably was. The "cost-savings" from such a merger might include consolidation of shows, stations, and new programming. For example, a combined NBC-CBS might decide to consolidate the NBC and CBS evening news. Why have both? They might consolidate the Jay Leno and David Letterman late night shows, or consolidate upstream program suppliers. Why have two competing and duplicative department that currently develop competing programming? And a combined CBS-NBC might decide to increase profits by forcing one station to drop the mass-audience programming currently carried in favor of alternative programming. Although a combined CBS-NBC might be more profitable, those profits would come at the expense of viewers, purchasers of programming, advertisers, and affiliates.

III. THE LEGAL FRAMEWORK

The Commission has asked for comments "on the statutory language of section 202(h) of the 1996 Act and the court's interpretation of that language in *Fox Television* and *Sinclair*."[174] Specifically, the Commission has invited comments on "the standard we should apply in determining whether to modify, repeal or retain our rules under section 202(h) of the Act" – in particular, whether section 202(h) requires the Commission to "repeal a rule unless we find it to be indispensable," or permits the rule to be retained if the record shows that it serves the public interest and therefore "we would be justified under the current circumstances in adopting it in the first instance."[175] In these comments, NAB and NASA focus on two points. *First*, the

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174 *NPRM* ¶ 18; *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002).

175 *Id.*

standard for retaining a rule under section 202(h) is no more demanding than the standard for adopting a rule in the first instance. The Commission has already taken this position before the court in *Fox Television*, and its position is correct and supported by the structure of section 202(h), the settled meaning of the same and similar phrases in other portions of the Communications Act, the Conference Report for the 1996 Act, and common sense. The Commission should adhere to its position in this proceeding. *Second*, the language of section 202(h) does not authorize the Commission to repeal a rule simply on the basis that the record in this proceeding does not support a determination that the rule remains necessary in the public interest. By its plain terms, the statute directs the Commission to "determine" whether each rule is necessary in the public interest as the result of competition, and to repeal or modify only those regulations that it "determines to be no longer in the public interest." Such a determination, like any other determination by the Commission, must be supported by the evidence and is subject to judicial review.

A. The Public-Interest Standard For Retaining A Rule Under Section 202(h) Is No More Demanding Than The Standard For Adopting A Rule In The First Instance

Section 202(h) directs the Commission to "determine whether any of [its existing] rules are necessary in the public interest as the result of competition" and to "repeal or modify any regulation it determines to be no longer in the public interest." In its initial opinion in *Fox Television*, the D.C. Circuit concluded (without benefit of full briefing) that the Commission, in conducting the initial Biennial Review required by section 202(h), "appears to have applied too low a standard. The statute is clear that a regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest."[176] The Commission petitioned for rehearing on grounds that the court's statement was both unnecessary to the decision and incorrect because section 202(h) equates a rule's being "necessary to the public interest" with its being "in the public interest." The court removed the above-quoted language, thus leaving the issue undecided.[177]

The Commission's interpretation of section 202(h) is correct, and the Commission should adhere to it in this proceeding. The structure of section 202(h), the settled meaning of the same and similar phrases in other portions of the Communications Act, and the Conference Report for the 1996 Act, all confirm that the public-interest standard for retaining a rule under section 202(h) is no more demanding than the standard for adopting a rule in the first instance. Moreover, a contrary interpretation of section 202(h) that requires the Commission to apply a higher standard for retaining a rule under the biennial review than is necessary to adopt a rule in the first instance is not well grounded in policy or common sense.

The structure of section 202(h). Section 202(h) instructs the Commission first to "determine whether any of [its existing] rules are necessary in the public interest" and then to repeal or modify any "regulation it determines to be no longer in the public interest." The pairing of these directives and the repetition of the verb "determines" strongly suggests that the two are intended to work together, *i.e.*, that the determination required by part A will form the basis of the decision to repeal or deny in part B. It is impossible to ascribe this sensible view to Congress if one construes the word "necessary" in part A to mean "essential" or "indispensable,"

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176 280 F.3d at 1050.

177 293 F.3d 537.

for it would destroy the parallelism between the two parts. Further, this interpretation would appear to require the Commission to make two sets of findings – a first set concerning which regulations are essential in the public interest, and a second set concerning which regulations are no longer in the public interest (whose use section 202(h) does specify). This result would surely be odd, if not absurd, and there is no reason to think that Congress intended to saddle the Commission with additional make-work tasks. Indeed, available evidence of legislative intent corroborates what section 202(h)'s structure implies: that the phrase "necessary to the public interest" equates with "in the public interest."

Settled meaning of the same and similar phrases in the Communications Act. Because "Congress expressly directed that the 1996 Act, along with its local-competition provisions, be inserted into the Communications Act of 1934,"[178] it is appropriate to look to other portions of the Communications Act to draw inferences about section 202(h)'s meaning.[179] Section 201(b) of the Act provides that the Commission "may prescribe such rules and regulations as may be *necessary in the public interest* to carry out the provisions of this Act."[180] Other provisions conferring rulemaking authority on the Commission use very similar language, including the term "necessary." For example, section 4(i),[181] provides that "[t]he Commission may . . . make such rules and regulations, . . . not inconsistent with this Act, as may be *necessary*

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178 *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 377 (1999).

179 *See Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (applying "normal rule of statutory construction" that "identical words used in different parts of the same act are intended to have the same meaning") (internal quotations omitted).

180 47 U.S.C. § 201(b) (emphasis added).

181 47 U.S.C. § 154(i) (emphasis added).

in the execution of its functions." Section 303(r),[182] provides that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with law, as may be *necessary* to carry out the provisions of this Act."

Supreme Court and D.C. Circuit decisions discussing the standard applicable to Commission actions under sections 201(b), 4(i), and 303(r) clearly establish that the Act, when speaking to the Commission's rule-making authority, uses the term "necessary" in the sense of "necessary and proper," not "indispensable." For example, the Supreme Court has held that section 201(b) confers upon the Commission a "general grant of rulemaking authority,"[183] and has never suggested that the Commission is required to make a showing of strict necessity before enacting a rule. In *FCC v. National Citizens Committee for Broadcasting*,[184] the Supreme Court noted that the Commission is authorized to promulgate "such rules and regulations, . . . not inconsistent with law, as may be *necessary* to carry out the provisions of [the Act]," section 303(r), and held that this statutory grant of authority confers on the Commission broad discretion, notwithstanding the word "necessary," to implement its view of the public-interest standard "so long as that view is based on consideration of permissible factors and is otherwise reasonable."[185]

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182 47 U.S.C. § 303(r) (emphasis added).

183 *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378 n.5 (1999).

184 436 U.S. 775 (1978).

185 *Id*. at 793 (emphasis added).

Similarly, the D.C. Circuit has described section 4(i) as the "necessary and proper clause" of the Act.[186] Section 4(i), like the Constitution's Necessary and Proper Clause,[187] has never been construed rigidly to require a demonstration of strict necessity.[188]

To be sure, the term "necessary" occurs in other provisions of the Act where context suggests a more restrictive meaning. The Supreme Court examined one such instance in *AT&T Corp. v. Iowa Utilities Bd.*[189] and the D.C. Circuit confronted another in *GTE Service Corp. v. FCC*.[190] Neither *Iowa Utilities Board* nor *GTE Service Corporation*, however, casts

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186 *Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1404 (D.C. Cir. 1996).

187 S*ee McCullough v. Maryland*, 17 U.S. 316 (1819).

188 *See Mobile Communications Corp.*, 77 F.3d at 1406 (courts must "accord substantial deference to 'the Commission's judgment regarding how the public interest is best served.'") (quoting *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981)). In accordance with this approach, the Supreme Court and D.C. Circuit have given broad construction to the Commission's discretion to regulate in the public interest, convenience, and *necessity*. *See*, *e.g. WNCN Listeners Guild*, 450 U.S. at 594; *NBC v. United States*, 319 U.S. 190, 216 (1943); *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940); *TRT Communications Corp. v. FCC*, 876 F.2d 134, 136 (D.C. Cir. 1989); *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, 352 (D.C. Cir. 1989); *WOKO, Inc. v. FCC*, 109 F.2d 665, 667 (D.C. Cir. 1940). Likewise, the Supreme Court has long recognized that the touchstone for assessing the substantive validity of the Commission's rules is whether they *serve* the public interest, not whether they are strictly *necessary* in the public interest. *See*, *e.g.*, *NBC*, 319 U.S. at 225 ("If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations."). *See also Pottsville Broad. Co.*, 309 U.S. at 138 (Communications Act was meant to be a "supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy").

189 525 U.S. 366, 388-390 (1999) (concluding Commission's unbundled access rule was inconsistent with section 251(d)(2)'s requirement that Commission consider whether access to certain network elements is "necessary" when determining what elements should be made available under section 251(c)(3)).

190 205 F.3d 416, 421-423 (D.C. Cir. 2000) (holding Commission's interpretation of equipment "necessary for interconnection or access to unbundled network elements" in section 251(c)(6) as "any equipment that is 'used or useful' for either interconnection or access to (continued…)

doubt on section 202(h)'s commonality with sections 201(b), 4(i), and 303(r). Those decisions interpreted the term "necessary" when it appeared within a "circumscribed statutory provision that seeks to ensure competition in areas of advanced technology in telecommunications," *GTE Service Corp.*,[191] not, as with these sections, when it appears in reference to the Commission's general rule-making authority.

Conference report for the 1996 Act. That section 202(h)'s phrase "necessary in the public interest" does not impose a heightened public-interest standard is bolstered by portions of the Joint Explanatory Statement by the Committee of Conference contained in the Conference Report accompanying the 1996 Act. The Committee's description of section 402 of the 1996 Act, which created the new section 11 in title I of the Communications Act, shows that Congress employed the phrase "necessary in the public interest" as a synonym for "meaningful" or "in the public interest," and not as a synonym for "indispensable." Section 11 directs the Commission biennially to "determine whether any . . . regulation [that applies to telecommunications service provider activities and operations] is no longer *necessary in the public interest* as the result of meaningful economic competition between providers of such service" and to "repeal or modify any regulation it determines to be no longer *necessary in the public interest*." (Emphasis added). Leaving no doubt that the emphasized phrases do not impose a strict-necessity standard, the Conference Report explains that the new section 11 simply "requires the Commission . . . to

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(footnote cont'd)

unbundled network elements, regardless of other functionalities inherent in such equipment" diverged from any realistic meaning of the statute).

[191] 205 F.3d at 421.

review its regulations that apply to the operations and activities of providers of telecommunication services and determine whether any of these regulations are no longer *in the public interest* because competition between providers renders the regulations no longer *meaningful*" and "to eliminate the regulations that it determines are no longer *in the public interest*." (Emphasis added).

The conference report is relevant to the proper interpretation of section 202(h) for several reasons. First, because the report "represents the final statement of terms agreed to by both houses, next to the statute itself it is the most persuasive evidence of congressional intent."[192] Second, under normal principles of statutory construction, it should be presumed that section 11's terms mean the same as section 202(h)'s because the two provisions employ identical language.[193] Finally, this presumption is reinforced section 202(h)'s cross reference to section 11, see § 202(h) (instructing the Commission to conduct the section 202(h) review "as part of its regulatory reform review under section 11 of the Communications Act of 1934"), which makes obvious that the two provisions were drafted with each other in mind.

Public policy and common sense. Lastly, the contention that a higher standard applies under section 202(h) makes little sense as a matter of policy or common sense. It is illogical to impute to Congress an intent to authorize the Commission to adopt new rules under one standard but then to require that the rules be repealed two years later if a higher standard – expressed in language *identical* to that of the first standard – is not met. The "odd result" of this interpretation, as the Commission put it in its petition for rehearing, would be that "the

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192 *Demby v. Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981).

193 *See Sullivan v. Stroop*, 496 U.S. 478, 484 (1990).

Commission could lawfully adopt a rule that it determines to serves the public interest, . . . [be required to] repeal the rule two years later in the biennial review process unless it could satisfy the higher standard of showing that the rule is 'necessary,' in the sense of vital or indispensable, to fostering diversity or competition," yet remain free to "adopt the rule once again if it determined that doing so would serve the public interest – but only for two more years until the next biennial review process." And as the Commission well explained in its rehearing petition, there is nothing in the legislative history of section 202(h) (or section 11, for that matter), to indicate that Congress intended a disjunction between the standard for adopting rules and the standard for reviewing rules in the biennial review process.

Accordingly, the Commission should adhere to its position before the D.C. Circuit: the public-interest standard that applies to the Commission's review of a rule under section 202(h) is no different from the standard that applies to its decision to adopt a rule under section 201(b).

B. Section 202(h) Also Imposes A Standard For Repealing Or Modifying Existing Rules

Section 202(h) provides that the Commission "*shall determine*" whether its rules "are necessary in the public interest as a result of competition" and "shall repeal or modify any regulation it *determines* to be no longer in the public interest." (Emphasis added). By its terms, this statutory language precludes the Commission from repealing or modifying any rule without a "determination" that the rule is no longer in the public interest. *See American Heritage Dictionary* 509 (3d ed. 1996) (defining "determine" as "To decide or settle . . . conclusively and authoritatively" and "To establish or ascertain definitively, as after consideration, investigation, or calculation"); *see also NLRB v. Radio and Television Broad. Engineers Union*, 364 U.S. 573, 579 (1961) (holding that the words "hear and determine the dispute" "convey not only the idea of hearing but also the idea of *deciding a controversy*") (emphasis added). Accordingly, the Commission may not repeal or modify any rule solely because it believes it cannot determine, based on the record before it, whether the rule remains in the public interest. Instead, the Commission is required to make a determination – either that the rule remains in the public interest, or that it does not.

A determination to repeal or modify a rule, like a determination to adopt a rule in the first instance or retain it, is final agency action subject to judicial review. That means, among other things, that the Commission's action must be based on the evidence in the record, must consider and respond to important points raised by commenters, and must not be arbitrary and capricious. The text of section 202(h) is thus consistent with the established rule that agency decisions to modify or repeal existing rules must be justified under the same standard that governs agency decisions to promulgate rules.[194]

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For the foregoing reasons, NAB and NASA urge the Commission to retain the 35 percent national television ownership rule based on substantial evidence that the rule continues to serve vital communications objectives that would be substantially undercut by a relaxation of the existing 35 percent cap. NASA further urges the Commission to retain the dual network rule in order to preserve competition and mitigate barriers to entry and growth for new television networks.

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[194] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983).

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